THE CONFLICTING INTERESTS OF LABOR DEMANDS AND EMPLOYER BASED IMMIGRATION LAWS: OLD PROBLEMS REQUIRE NEW SOLUTIONS

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I. INTRODUCTION

On the morning of December 12, 2006, Immigration and Customs Enforcement Officials (ICE)[1] terrorized workers in an interstate raid on Swift & Company meat packing facilities in Texas, Nebraska, Colorado, Utah, Iowa, and Minnesota.[2] Agents stormed in with military weapons,[3] and effectively detained more than twelve thousand workers, most of whom were American citizens or legal permanent residents.[4] The officials locked down the buildings and prevented people from using the bathrooms and telephones, leaving families and children stranded with no

1. JAMES T. O'REILLY, HOMELAND SECURITY DESKBOOK, Chapter 9.03[3][a] (Matthew Bender 2007 Supp.) ("U.S. Immigration and Customs Enforcement (ICE), the largest investigative division of DHS, is responsible for the U.S. Immigration laws. According to the agency's mission statement, the primary focus of ICE is to 'prevent acts of terrorism by targeting the people, money and materials that support terrorist and criminal activities.'").

2. *See* Oskar Garcia, *Meatpackers Union Sues Over Plant Raids*, WASH. POST, Sept. 12, 2007, *available at* http://www.washingtonpost.com/wpdyn/content/article/2007/09/12/AR2007091201532.html ("Union president Joseph Hansen said workers were handcuffed and held for hours and denied access to phones, bathrooms, legal counsel and their families."). Not only did ICE cause harm by detaining the workers during this raid, but it also caused serious financial harm to Swift. *Id.* Swift's financial loss due to the raid was estimated at $50 million. *Id.*

3. *See* Press Release, United Food and Commercial Workers Int'l Union, ICE Terrorizing Immigrant Workers Because of Failed U.S. Immigration Policy (Dec. 13, 2006), http://www.ufcw.org/press_room/index.cfm?pressReleaseID=275 ("United Food and Commercial Workers Union (UFCW) members working in Swift and Company meatpacking plants are reporting that Immigration and Customs Enforcement (ICE) agents marched into plants Tuesday morning with military weapons, herding, segregating, and terrorizing workers. Plants and plant gates were locked down."). In addition, Mark Lauritsen, International Vice President and Director of the Food Processing, Packing, and Manufacturing division of the UFCW said, "The display of force by ICE agents is totally outrageous .... We believe they are victims of wholesale violations of worker rights. In effect, ICE is criminalizing people for going to work." *Id.*

4. *See* Oskar Garcia, *Meatpackers Union Sues Over Plant Raids*, WASH. POST, Sept. 12, 2007, *available at* http://www.washingtonpost.com/wpdyn/content/article/2007/09/12/AR2007091201532.html ("ICE officials investigating identity theft arrested 1297 workers at the plants in December, but union officials have said that more than 12,000 workers were detained against their will during the raids."). Of the 274 workers arrested for identity theft, nearly all were convicted. *Id.* During the raid 649 workers were arrested for being in the country illegally and deported only a few months later. *Id.*

information.[5] In Colorado, workers heard gun shots fired.[6] The raids resulted in just over twelve hundred arrests.[7]

Federal lawsuits were quickly filed in response to the treatment these workers received during the ICE raids.[8] Nonprofit legal assistance provider Centro Legal filed a lawsuit on behalf of ten workers of Swift & Company's facility in Minnesota, claiming that federal agents involved in the raid violated the rights of the workers by directing racial epithets at them and forcing female workers to undress.[9] On September 12, 2007, the United Food and Commercial Workers Union filed a class action suit claiming constitutional violations, as well as violations of the Immigration and Nationality Act.[10] The plaintiffs include workers from facilities

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5. Press Release, United Food and Commercial Workers Int'l Union, ICE Terrorizing Immigrant Workers Because of Failed U.S. Immigration Policy (Dec. 13, 2006), http://www.ufcw.org/press_room/index.cfm?pressReleaseID=275 (discussing the way union members were treated throughout the raid).

> Families have been ripped apart leaving traumatized children stranded at school waiting to be picked up. In some cases, their parents are being transported to detention centers in distant cities and denied the opportunity to call anyone to make arrangements for their children. Workers at the Swift plant in Grand Island, Neb., have been bussed to Camp Dodge, Iowa, six hours away from their families, with no guarantee of return transportation. *Id.*

6. *Id.* ("Workers at the Greeley Colo., plant reported that gun shots were fired. Representatives and attorneys with the UFCW, who have standing to represent these workers, have been denied access to the detained workers."). Furthermore, Vice President Lauristen noted the following:

> Workers caught in this vice are victims of a failed immigration system. It's time for the federal government to stop victimizing workers and reform our immigration system .... The last do-nothing Congress failed to produce its promised immigration reform before recess. The result is that children have been orphaned, left to sleep in strange beds and uncertain about their holiday or their future. Worksite raids with armed agents are not the answer to the nationwide call for immigration reform. America deserves a humane, systematic and comprehensive immigration policy immediately. *Id.*

7. *See* Oskar Garcia, *Meatpackers Union Sues Over Plant Raids*, WASH. POST, Sept. 12, 2007, *available at* http://www.washingtonpost.com/wpdyn/content/article/2007/09/12/AR2007091201532.html ("ICE officials investigating identity theft arrested 1297 workers at the plants in December.").

8. *See generally id.* (discussing civil suits filed against the Department of Homeland Security).

9. *Minnesota: Immigrants Mistreated in Raid, Suit Claims*, N.Y. TIMES, Sept. 5, 2007, *available at* http://www.nytimes.com/2007/09/05/us/05brfs-IMMIGRANTSMI_BRF.html ("A lawsuit filed by [Centro Legal,] an immigrant rights group[,] claims that federal agents who raided a meatpacking plant in Worthington last December detained Hispanic workers, hurled racial epithets at them and forced the women to take off their clothes."). The ten workers at the Swift & Company facility in Worthington, Minnesota were in the United States legally. *Id.*

10. Original Complaint–Class Action Request for Injunctive and Declaratory Relief and Damages Jury Demand on Damage Claims at 2, United Food & Commercial Workers

across the nation, including, Texas, Iowa, and Colorado.[11] These legal resident plaintiffs claim that they were denied access to legal counsel; failed to be advised of their right to remain silent; had their personal belongings searched without warrants; were unlawfully restrained for up to eight hours; endured assault and battery; and one plaintiff was arrested and transported to a deportation center.[12]

These are just a few examples of the workplace raids that are happening around the country as a result of the Department of Homeland Security's (DHS) get-tough policy on enforcing immigration laws in the workforce.[13] DHS chief Michael Chertoff announced plans for an agency crackdown on employers on April 20, 2006, immediately following a similar raid on IFCO systems in New York, Pennsylvania, Ohio, Arizona,

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Int'l Union v. U.S. Dep't of Homeland Sec. (N.D. Tex. Sept. 11, 2007) (No. 2-07CV-188-J), 2007 WL 4825029, http://www.ufcw.org/docUploads/9-11-07SwiftRaidsComplaintFin.pdf?CFID=3912381&CFTOKEN=16828907 (listing the multifarious constitutional claims plaintiffs are making against ICE). Plaintiffs are seeking incidental damages for those alleged constitutional violations as well as violations to the Immigration and Nationality Act. *Id.*

11. *Id.* at 3–7 (identifying plaintiffs who had similar claims across the country, proving problems with workplace raids were systemic and not targeted to one specific location). Most plaintiffs identified are citizens or lawful permanent residents of the United States. *Id.* These workers were UFCW members and had been employed at similar facilities across the country for time periods ranging from three to over twenty years. *Id.* UFCW members were allegedly detained as immigrants in violation of the Immigration and Nationality Act without requisite reasonable suspicion or probable cause. *Id.* at 3.

12. *Id.* (listing specific violations plaintiffs experienced during the Swift raids). Plaintiffs allege that these actions by ICE not only were unconstitutional, but interfere with operation of businesses and work of union members. *Id.*

13. Aimee Molloy, *Placating the GOP Base or Protecting the Workplace?*, SALON.COM, July 27, 2007, http://www.salon.com/news/feature/2007/07/27/ice_raid/.

> Over the last several months, as immigration reform has been debated on Capitol Hill, massive arrest and deportation operations like this have become a key component in the enforcement of existing laws. In the first five months of 2007, 3226 undocumented workers were arrested on the job, compared with just 485 in all of 2002. Recent raids have included an operation that netted 62 sanitation workers at an Illinois pork plant, 21 employees of a Mexican restaurant chain in Arkansas, and 31 workers at a Dallas factory that repairs Fossil watches. *Id.*

The U.S. government initiated these operations to punish employers who knowingly hire undocumented workers and end the American public's tolerance of illegal immigration. *Id. See* Mary E. Pivec, *The Department of Homeland Security Announces a New Get Tough Enforcement Policy Against Employers*, SHEPPARD, MULLIN, RICHTER & HAMPTON L.L.P., Apr. 21, 2006, *available at* http://www.laboremploymentlawblog.com/10560-print.html (addressing a new "get tough" policy arising from U.S. congressional debate over immigration reform).

North Carolina, Texas, Indiana, Massachusetts, and Virginia.[14] These raids continue with increasing frequency across the country.[15]

Additionally, DHS announced a new rule altering employers obligations to enforce immigration laws.[16] When inconsistencies arise in an employee's Social Security information, Social Security Administration (SSA) sends out a letter notifying the employer.[17] Under the new DHS regulation, this "no-match" letter now puts the employer on "constructive notice" that this particular employee is not authorized to work in the United States.[18] If the employer fails to correct the information or fire the employee within a certain period of time, the employer faces fines up to $10,000 for each employee.[19] DHS initially held off on this rule to give Congress time to develop a comprehensive immigration bill, but since these legislative efforts largely ended in June 2007, DHS decided to go

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14. Mary E. Pivec, *The Department of Homeland Security Announces a New Get Tough Enforcement Policy Against Employers*, SHEPPARD, MULLIN, RICHTER & HAMPTON L.L.P., Apr. 21, 2006, *available at* http://www.laboremploymentlawblog.com/10560-print.html ("The raids were carried out pursuant to criminal enforcement measures accusing the company and its executives of criminal conspiracy with the objective of harboring and transporting undocumented workers.").

15. *See* Adam Nossiter, *Hundreds of Workers Held in Immigration Raid*, N.Y. TIMES, Aug. 26, 2008, at A12, *available at* http://www.nytimes.com/2008/08/26/us/26raid.html?_r=1&scp=1&sq=Hundreds%20of%20Workers%20Held%20in%20Immigration%20Raid&st=cse&oref=slogin (reporting on a raid in Laurel, Mississippi). This raid occurred just after another similar one in Postville, Iowa. *Id.* "That raid was a significant escalation of the Bush administration's enforcement practices because those detained were not simply deported, as in previous raids, but were imprisoned for months on criminal charges of using false documents." *Id.*

16. Anthony E. Weigel, *Update on the Department of Homeland Security's Proposed Social Security "No-Match" Regulation*, BLACKWELL SANDERS L.L.P., Aug. 9, 2007, *available at* http://www.judged.com/jdfirmdetail.php?firmid=200&currentpage=5 (explaining that on June 14, 2006 the Department of Homeland Security proposed a new rule to clarify employers' obligations under existing law).

17. *Id.* ("For over ten years, the Social Security Administration has been notifying employers of employees whose Social Security numbers do not match the agency's records.").

18. *Id.* (indicating that receipt of a letter from the Social Security Administration regarding a Social Security number mismatch for an employee creates constructive knowledge).

19. *Id.*

> The proposal also stated that an employer could avoid the risk that it could be found to have constructive knowledge that an employee lacked authorization if it took certain "safe harbor" steps within a 63-day time period to rectify the situation. If an employer cannot resolve the issue, it risks being found to have knowingly violated the law, which can result in civil penalties already in place ranging from $250 to $10,000 per employee. *Id.*

forward with its no-match rules.[20] This policy has led to a lawsuit alleging that DHS is going beyond its power to enforce the laws already created by the Legislature.[21] The suit claims that this new rule both infringes on workers rights and unduly burdens workers.[22] In October 2007, a federal judge issued an injunction preventing DHS from moving forward with their plan.[23] In response to this court's ruling, DHS published a supplemental proposed version of the original rule, which is merely a republica-

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20. Julia Preston, *U.S. Set for a Crackdown on Illegal Hiring*, N.Y. TIMES, Aug. 8, 2007, at A1, *available at* http://www.nytimes.com/2007/08/08/washington/08immig.html.

> After first proposing the rules last year, Department of Homeland Security officials said they held off finishing them to await the outcome of the debate in Congress over a sweeping immigration bill. That measure, which was supported by President Bush, died in the Senate in June. Now administration officials are signaling that they intend to clamp down on employers of illegal immigrants even without a new immigration law to offer legal status to millions of illegal immigrants already in the workforce. *Id.*

21. Spencer S. Hsu, *Plan to Target Businesses that Employ Immigrants Draws Fire*, WASH. POST, Sept. 8, 2007, at A08, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/07/AR2007090702730_pf.html.

> A pending crackdown by the Bush administration against U.S. companies that employ illegal immigrants faced growing opposition yesterday, as the U.S. Chamber of Commerce and several large industry groups joined an AFL-CIO lawsuit to halt the program and the U.S. Small Business Administration said it was considering whether to take their side. *Id.*

22. Press Release, Am. Civil Liberties Union, Court Halts Government from Implementing Flawed Social Security No-Match Rule (Aug. 31, 2007), http://aclu.org/immigrants/workplace/31537prs20070831.html.

> In the lawsuit, [the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Civil Liberties Union (ACLU), the National Immigration Law Center (NILC) and the Central Labor Council of Alameda County along with other local labor movements] charge that the misguided rule violates the law and workers rights and imposes burdensome obligations on employers who receive SSA "no-match" letters that inform them of alleged discrepancies between employee records and the SSA database. *Id.*

Moreover, John Sweeney, the President of the AFL-CIO was especially pleased that the judge recognized the need to halt the implementation of this ill-advised DHS rule. *Id.* He went on the note that employers have historically used SSA "no-match" letters to exploit workers and this rule would only give them a stronger pretext for doing more of the same. *Id.*

23. *See* Order Granting Motion for Preliminary Injunction at 22, Am. Fed'n of Labor, v. Chertoff (N.D. Cal. Oct. 7, 2007) (No. C 07-04472 CRB), *available at* http://www.nilc.org/immsemplymnt/SSA_Related_Info/no-match_PI_order_2007-10-10.pdf ("Because the balance of harms tips sharply in favor of plaintiffs and plaintiffs have raised serious questions going to the merits, the motion for a preliminary injunction is GRANTED.").

tion of the previous rule.[24] The new rule resulted in an outcry from immigration and civil rights activists.[25]

A. *Origins of Employment Based Enforcement*

The newest wave of attempts to reform immigration in the workplace comes from a long trend of directing enforcement efforts toward the roots of illegal immigration job opportunities. Prior to 1986, the burden to prove that an employee could legally work in the United States rested solely with the employee.[26] In 1986, Congress enacted the Immigration Reform and Control Act (IRCA).[27] Employer sanctions designed to tar-

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24. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis, 73 Fed. Reg. 15,944 (Mar. 26, 2008) (to be codified at 8 C.F.R. pt. 274a) ("DHS proposes this supplemental rule to address the issues raised by the court in the preliminary injunction order. After addressing these three issues, DHS will seek to have the preliminary injunction dissolved.").

25. Press Release, Am. Civil Liberties Union, Civil Rights, Immigration Policy and Workers' Rights Groups Present New Evidence on Devastating Impact of "No-Match" Rule (Apr. 25, 2008), http://www.aclu.org/immigrants/workplace/35027prs20080425.html (summarizing public comments made by advocacy groups pertaining to the new version of the no-match rule).

26. *See Problems in the Current Employment Verification and Worksite Enforcement: Hearing on H.R. 1645 Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary,* 110th Cong. 2 (2007) (statement of Stephen Yale-Loehr, Adjunct Professor, Cornell University Law School), http://judiciary.house.gov/hearings/April2007/Yale-Loehr070424.pdf ("If an unauthorized worker was among the ranks of their employees, nobody questioned it and the employer was free to go on with business as usual without worry; it was simply up to the undocumented worker to avoid being caught by immigration authorities and deported."). This legislation, more commonly known as the "Texas Proviso," came about in 1952, setting forth that it was illegal to "harbor" an illegal immigrant, but it was *not* illegal to employ an illegal immigrant. *Id.*

27. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 274A(a)(1)-(2), (4), 100 Stat. 3359 (1986) (codified as amended in 8 U.S.C.A. § 1324a (West 2008)).

> (1) IN GENERAL. – It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States —
> (A) an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to such employment, or
> (B) an individual without complying with the requirements of subsection (b).
> (2) CONTINUING EMPLOYMENT. – It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien in respect to such employment . . . .
> . . . .
> (4) USE OF LABOR THROUGH CONTRACT. – For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after the date of the enactment of this section, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien

get the causes of illegal immigration were included in this legislation.[28] The idea was that employer sanctions would deter employers from hiring illegal workers, and this would cause a reduction in the number of illegal workers attempting to find work.[29] Despite provisions built into the law to prevent it, the law led to rampant employee discrimination.[30]

In 1996 Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) with an emphasis on attacking the verification process through which employers checked the legal status of their employees.[31] This legislation introduced the Basic Pilot Program, an electronic employment verification system to check the accu-

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(as defined in subsection (h)(3)) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A). *Id.*

28. *See id.* §§ 274A(a)(1)-(2) (regulating the hiring, continuing employment, the use of labor through contract, and the use of state employment agency documentation of unauthorized aliens).

29. *Problems in the Current Employment Verification and Worksite Enforcement: Hearing on H.R. 1645 Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) (statement of Stephen Yale-Loehr, Adjunct Professor, Cornell University Law School), http://judiciary.house.gov/hearings/April2007/Yale-Loehr070424.pdf ("The theory behind employer sanctions is twofold: (1) imposing penalties on employers of undocumented workers will deter the hiring of such noncitizens; and (2) because securing employment is the primary reason for illegal entry and residence, this will reduce incentives for illegal entry.").

30. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 2-4 (1990), http://archive.gao.gov/d24t8/140974.pdf (discussing the reasons IRCA failed in its goal to deter illegal workers without increasing discrimination). The report offered three possible reasons for the discrimination: "(1) employer lack of understanding of the law's major provisions; (2) employer confusion and uncertainty on how to determine eligibility; and (3) alien use of counterfeit or fraudulent documents, which contributed to employer uncertainty over how to verify eligibility." *Id.* at 72. The General Accounting Office found that most of the discrimination stemmed from employer confusion about complying with the law's verification requirements. *Id.* "We also noted that another 430,000 employers began citizenship discrimination as a result of the law." *Id.* Citizenship discrimination is also illegal and such practice could harm persons of Hispanic and Asian origins. *Id.*

31. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009-658 (codified as amended in scattered sections of U.S.C.), *available at* http://www.lib.umich.edu/govdocs/text/104208.txt (highlighting TITLE IV "Enforcement of Restrictions Against Employment" that established three pilot programs for employment eligibility confirmation).

racy of employee I-9 information against the Social Security database.[32] This system proved costly, error-ridden, and ineffective.[33]

This comment will examine whether employer sanctions are good public policy for enforcing immigration laws. It will look at the two ways DHS has recently been enforcing immigration laws in the workplace, no-match letters and workplace raids. It seeks to determine whether these are effective methods to enforce immigration law violations. In doing so, it will look at the effect these policies have on employees, both citizens and non-citizens. In addition, it will also analyze recent legal challenges posed by workers and worker rights groups. Finally, it will determine whether these policies are discriminatory or whether they lead to discriminatory practices.

II. LEGAL BACKGROUND

Employer enforcement of immigration laws began when Congress passed the Immigration Reform and Control Act of 1986.[34] Congress determined that the availability of job opportunities was the cause of most

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32. *Id.*

> (a) BASIC PILOT PROGRAM.-A person or other entity that elects to participate in the basic pilot program described in this subsection agrees to conform to the following procedures in the case of the hiring . . . for employment in the United States of each individual covered by the election:
>
> (1) Provision of additional information. The person or entity shall obtain from the individual (and the individual shall provide) and shall record on the I-9 or similar form—
>
> (A) the individual's social security account number, if the individual has been issued such a number, and (B) if the individual does not attest to United States citizenship under section . . . such identification or authorization number established by the Immigration and Naturalization Service for the alien as the Attorney General shall specify, and shall retain the original form and make it available for inspection for the period and in the manner required of I-9 forms under section 274A(b)(3). *Id.*

In general, the employer will have three working days to verify the employee's eligibility to work in the United States using the confirmation system. *Id.*

33. *See Problems in the Current Employment Verification and Worksite Enforcement: Hearing on H.R. 1645 Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 6 (2007) (statement of Stephen Yale-Loehr, Adjunct Professor, Cornell University Law School), http://judiciary.house.gov/hearings/April2007/Yale-Loehr070424.pdf (evaluating the Basic Pilot Program using statistical information as to why the employment verification system failed as "a perfect solution to the employer sanctions problem").

34. *Id.* at 3 ("Until 1986 no law made it illegal for an employer to hire an undocumented worker. In fact, in 1952, in passing legislation making it illegal for any American to 'harbor' an undocumented individual, Congress stated that it was specifically *not* illegal to hire such an individual.") This legislation used a three-pronged approach addressing competing concerns regarding the hiring of illegal immigrants. *Id.*

illegal immigration.[35] Congress thought criminalizing the practice of hiring illegal workers would prevent the activity, and thus effectively cut off the supply of jobs drawing immigrants.[36] To dissuade employers from hiring undocumented workers, Congress imposed sanctions for knowingly hiring illegal workers.[37] Civil penalties were imposed for simple violations,[38] but for patterns of violations, the law imposed criminal sanctions, even including jail time.[39]

Congress foresaw three major problems in this system, all of which came to fruition and eventually lead to practical abandonment of these policies.[40] The first was the fear that the new system might be cumbersome for employers.[41] Employers were unprepared to identify fraudulent documentation and were given no resources by the government to assist them.[42] This led to the second problem, a lack of clarity regarding documentation sufficient to prove citizenship.[43] In debating the bill, Congress members were resistant to any idea that resembled a national identifica-

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35. *See id.* at 2 (stating the congressional theory on the pull factor of employment for illegal immigration). "[S]ecuring employment is the primary reason for illegal entry and residence." *Id.*

36. *See id.* (discussing Congress's hypothesis that cutting off the supply of jobs by criminalizing hiring of illegal workers would cut down on the motivations for illegal entry). "[I]mposing penalties on employers of undocumented workers will deter the hiring of such noncitizens." *Id.*

37. 8 U.S.C.A. § 1324a(e)(4)(A)-(B) (West 2008); 8 U.S.C.A. § 1324a(f) (West 2008) (itemizing the fines and penalties for violations).

38. 8 U.S.C.A. § 1324a(e)(4)(A)-(B) (West 2008) (documenting that fines range from $250 to $10,000 depending on whether it was a subsequent offense).

39. *Id.* § 1324a(f) (discussing the possibility of up to six months in jail for repeated violations).

40. *See Problems in the Current Employment Verification and Worksite Enforcement: Hearing on H.R. 1645 Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 4 (2007) (statement of Stephen Yale-Loehr, Adjunct Professor, Cornell University Law School), http://judiciary.house.gov/hearings/April2007/Yale-Loehr070424.pdf (summarizing the three areas of concern Congress had regarding the employer sanctions and how those fears became reality and ended the policies). "GAO report concluded that IRCA's employer sanctions provisions failed to deter undocumented workers and increased discrimination against foreign-looking and -sounding workers . . . ." *Id.*

41. *Id.* at 3 ("Not only would all employers be subject to new paperwork obligations; employer sanctions also raised the specter that employers would have to become experts in immigration law to identify which categories of noncitizens were authorized to work.").

42. *Id.* at 4 ("The appropriate and necessary resources required to run the program were never devoted to it.").

43. *Id.* (discussing the difficulty employers face determining which documents are appropriate to verify employment eligibility). "Employers, often having had little or no training in detecting fraudulent documents, were faced with the dilemma of either blindly accepting these documents or acting on a hunch and rejecting the documents but then facing penalties or lawsuits as a result of IRCA's antidiscrimination provisions." *Id.*

tion system.[44] When the bill passed it contained a provision making clear the legislative intent to avoid national identification cards.[45] This resulted in twenty-nine different documents permitted for proving work eligibility.[46] The plethora of documents made this system ripe for document fraud.[47] The third concern was that these policies would lead to discriminatory hiring practices towards ethnic minorities.[48] In hearings prior to

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44. *Id.* at 3 ("The risk that this might lead to a 'national identity card,' however, caused many members of Congress to shy away from such a requirement. Those opposed to a identity card won.").

45. 8 U.S.C.A. § 1324a(b)(6)(c) (West 2008) ("No authorization of national identification cards[:] Nothing in this section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card.").

46. *Problems in the Current Employment Verification and Worksite Enforcement: Hearing on H.R. 1645 Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 4 (2007) (statement of Stephen Yale-Loehr, Adjunct Professor, Cornell University Law School), http://judiciary.house.gov/hearings/April2007/Yale-Loehr070424.pdf (stating that the multitude of documents allowed to prove workers eligibility creates an environment ripe for fraud). "At the time of IRCA's implementation, 29 different types of documents were acceptable to verify work authorization and identity." *Id.*

47. *Id.* ("With so many different documents allowed, this provided ample opportunity for fraud to take place."). The H.R. 4437, bill legislation proposed and passed by the House of Representatives, includes measures designed to address the issue of fake documents and identity theft. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 210 (2005).

> SEC. 210. ESTABLISHMENT OF THE FORENSIC DOCUMENTS LABORATORY.
>
> (a) In General- The Secretary of Homeland Security shall establish a Fraudulent Documents Center (to be known as the Forensic Document Laboratory) to carry out the following:
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> (1) Collect information from Federal, State, and local law enforcement agencies, and foreign governments on the production, sale, distribution, and use of fraudulent documents intended to be used to enter, travel, or remain within the United States unlawfully.
>
> (2) Maintain the information described in paragraph (1) in a comprehensive database.
>
> (3) Maintain a repository of genuine and fraudulent travel and identity document exemplars.
>
> (4) Convert the information collected into reports that provide guidance to government officials in identifying fraudulent documents being used to enter into, travel within, or remain in the United States.
>
> (5) Develop a system for distributing these reports on an ongoing basis to appropriate Federal, State, and local law enforcement agencies.
>
> (b) Distribution of Information - The Forensic Document Laboratory shall distribute its reports to appropriate Federal, State, and local law enforcement agencies on an ongoing basis. *Id.*

48. *Problems in the Current Employment Verification and Worksite Enforcement: Hearing on H.R. 1645 Before the Subcomm. on Immigration, Citizenship, Refugees, Border*

enacting the bill, several scenarios were suggested.[49] Employers already harboring discriminatory sentiments would have a legal defense against civil rights violations. Also, employers would avoid hiring minority citizens or legal foreign-born workers in efforts to avoid potential sanctions or obtrusive paperwork.[50]

Congress tried to address these provisions by approaching IRCA from three directions. The first provision makes it illegal to knowingly hire an undocumented worker.[51] The second provision requires employers to verify employee eligibility to work based on the authenticity of various documentation.[52] Finally, IRCA attempts to forbid discrimination based on citizenship status or ethnicity.[53] The anti-discrimination provisions were a failure.[54] In 1990, the Government Accounting Office (GAO) reported in its third and final report under the legislation that IRCA cre-

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Security, and International Law of the H. Comm. on the Judiciary, 110th Cong. 3 (2007) (statement of Stephen Yale-Loehr, Adjunct Professor, Cornell University Law School) (noting that the discrimination would be applied to individuals who "looked foreign or sounded foreign" and existing employment laws would not remedy the problem).

49. 131 CONG. REC. E4760-01, 2 (daily ed. Oct. 23, 1985) (statement of Raul Yzaguirre, President, National Council of La Raza) (looking at "real world" evidence of the actions of actual employers in regards to sanctions and employee discrimination). The more employer sanctions that are in place the increased likelihood that employee discrimination would occur. *Id.*

50. *Id.* (discussing how even good-faith attempts to abide by the law could be a threat to minority workers). Raul Yzaguirre goes on to talk about the threat of small businesses in particular. *Id.* He states in many cases small business owners lack sophistication and do not understand the law. *Id.* In this case, they will avoid the law through their hiring practices. *Id.*

51. 8 U.S.C.A. § 1324a(a)(1)(A) (West 2008) (making it illegal to recruit or refer an undocumented worker for employment).

52. *Id.* § 1324a(b)(1)(B)-(D) (listing the documents permitted to verify identification and work eligibility).

53. *Id.* § 1324b(a)(1) (describing illegal discriminatory hiring practices).

54. *Problems in the Current Employment Verification and Worksite Enforcement: Hearing on H.R. 1645 Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 4 (2007) (statement of Stephen Yale-Loehr, Adjunct Professor, Cornell University Law School), http://judiciary.house.gov/hearings/April2007/Yale-Loehr070424.pdf ("The GAO report found that the enactment of employer sanctions had created 'a serious pattern of discrimination.'").

> The GAO report concluded that IRCA's employer sanctions provisions failed to deter undocumented workers and increased discrimination against foreign-looking and -sounding workers because of: "1. lack of understanding of the laws requirements, 2. confusion and uncertainty on the part of employers abut how to determine employment eligibility, and 3. the prevalence of counterfeit and fraudulent documents that contributed to employer uncertainty over how to verify eligibility." *Id.*

ated a pattern of discrimination.[55] The report stated that nineteen percent of employers initiated discriminatory hiring practices as a result of the new legislation.[56] The report clarified that discrimination regarding national origin was new discrimination and was a direct result of IRCA.[57] Although the report did find the law had some effect in deterring an illegal workforce, the GAO found the discriminatory effect on legal workers far outweighed the minor deterrent effect, to the extent that the GAO suggested the law be repealed or suspended until problems in fairly verifying work eligibility could be corrected.[58] Thus, the only measurable result of IRCA was increased discrimination among minority workers, especially in the Latino community.[59]

The employer-based sanctions were largely a failure because Congress did not provide resources for the system to function.[60] No procedure was implemented for the employer to check the legitimacy of employee documentation and governmental infrastructure to assist employers was lacking.[61] The numerous documents allowed to prove eligibility, coupled with the inability of employers to determine whether or not the document was fraudulent, made it impossible for employers to navigate and work with this burdensome obligation.[62] Eventually, the program was practically abandoned.[63]

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55. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-62, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 1 (1990), http://archive.gao.gov/d24t8/140974.pdf (listing the results of IRCA).

56. *Id.* ("Adding these employers to those who began national origin discrimination, GAO estimates that 891,000 (19[%]) of the 4.6 million employers in the survey population nationwide began one or more discriminatory practices as a result of the law.").

57. *Id.* ("Therefore, they represent 'new' national origin discrimination that would have not occurred without IRCA.").

58. *Id.* at 11 (suggesting options to Congress on how to combat the discriminatory effect of the law).

59. *Id.* at 7.

60. *Problems in the Current Employment Verification and Worksite Enforcement: Hearing on H.R. 1645 Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. 7 (2007) (statement of Stephen Yale-Loehr, Adjunct Professor, Cornell University Law School), http://judiciary.house.gov/hearings/April2007/Yale-Loehr070424.pdf (concluding that the program failed because resources were never devoted to it and as a result, employers were unequipped to handle the high number of fraudulent documents).

61. *See id.* (summarizing that because of the sheer quantity of documents and the lack of governmentally provided resources, employers faced a dilemma of adhering to the inefficient rules or facing sanctions for their disregard of them).

62. *See id.* (addressing that the multitude of documents available for verification and the lack of governmental resources made the program impossible to maintain and enforce).

63. *See id.* (declaring that fraud and discrimination overtook the program, which led to its failure and abandonment).

In 1996, Congress again attempted to address immigration reform through the workplace.[64] Again, Congress failed to provide enough resources to realistically encourage workplace enforcement; however, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) did introduce Basic Pilot, an employee verification program that is still available today.[65] Currently, Basic Pilot is a voluntary program.[66] To use it, an employer has a new employee fill out an I-9 form, then electronically submits that information for comparison against the Social Security database.[67] If the information matches, then the employee is eligible for employment; however, if there is a discrepancy, the United States Citizenship and Immigration Services (USCIS) will notify the employer, who in turn will notify the employee of the problem and

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64. *Id.* at 5 ("Congress tried to address problems in the employer sanctions regime as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).").

65. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, § 404(a), 110 Stat. 3009-664 (1996) (codified as amended in scattered sections of U.S.C.), *available at* http://www.lib.umich.edu/govdocs/text/104208.txt.

> (a) IN GENERAL. – The Attorney General shall establish a pilot program confirmation system through which the Attorney General (or a designee of the Attorney General, which may be a non governmental entity) –
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> (1) responds to inquiries made by electing persons and other entities (including those made by the transmittal of data from machine-readable documents under the machine-readable pilot program) at any time through a toll-free telephone line or other toll-free electronic media concerning an individual's identity and whether the individual is authorized to be employed, and
>
> (2) maintains records of the inquiries that were made, of confirmations provided (or not provided), and of the codes provided to inquirers as evidence of their compliance with their obligations under the pilot programs. *Id.*

66. *See generally* U.S. Citizenship and Immigration Services, Registration for Employment Verification Pilot Program, https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx (check the "I agree" box; then follow the "Continue" hyperlink) (last visited Oct. 26, 2008) (explaining the process for using the E-Verify web page and thereby establishing the inference that the process is voluntary).

> Employer access allows you to use E-Verify to verify the employment eligibility of your company's newly hired employees. If your company has multiple locations, this type of access also allows you to choose to use E-Verify for some or all of your locations (which you can add and remove as needed). In nearly all cases, no matter how big or small your organization is, you'll want to choose this method for using E-Verify. *Id.*

67. *See* Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1174 (10th Cir. 2007) (en banc) (describing all the required information needed on the I-9 form). This information includes name of applicant, date of birth, Social Security number, and status of citizenship (if provided). *Id.*

give him or her eight days to resolve it.[68] The employer is permitted to discharge the employee if the employee fails to contact the agency or otherwise fails to resolve the issue.[69] If the employer fails to discharge an employee who does not pass the Basic Pilot test, the employer is setting itself up for legal penalties.[70] In 2006, both the House of Representatives and the Senate passed different bills that would make Basic Pilot mandatory for all employers.[71]

There are many functional problems with the Basic Pilot System.[72] The current system is not designed to handle the requests of all employers, which will result in sluggish processing times, likely exceeding the limited time allowances for verifying work eligibility.[73] In addition, both employers and employees could have to wait for two weeks before eligibility is confirmed, causing problems for business in lost productivity and

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68. *See id.* (explaining the process if the employee information given does not match the Social Security database).

69. *See id.* at 1174–75 (clarifying the employer's options when the employee fails to prove that the discrepancies are inaccurate). Should the employee choose "to contact the relevant agency and the agency resolve the issue," the burden is on the employee to inform his or her employer. *Id.* The burden then shifts back to the employer "to confirm with the new result through the Basic Pilot computer system." *Id.*

70. *See id.* at 1175 (advising of the consequences should an employer allow an unverified employee to stay on staff).

71. *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 704 (2005) (proposing to change the deadline for the basic pilot program to take effect). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 would be changed to read "two years after the enactment of the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005." *Id.*; *see also* Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. §§ 613–14 (2006) (proposing that blue card status be conferred to any alien who has worked in the agricultural field). The alien must apply for the blue card status during the eighteen month period after the seventh month of the enactment of the Act. *Id.* The alien must be eligible under the Immigration and Nationality Act. *Id.*

72. *Problems in the Current Employment Verification and Worksite Enforcement: Hearing on H.R. 1645 Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary,* 110th Cong. 6 (2007) (statement of Stephen Yale-Loehr, Adjunct Professor, Cornell University Law School), http://judiciary.house.gov/hearings/April2007/Yale-Loehr070424.pdf (listing the problems with Basic Pilot). "The most fundamental problem remains the fact that for the system to work, DHS must run the identity information it receives against the SSA database, a database that is otherwise outside the Basic Pilot Program system and that is not intended to be used for immigration purposes." *Id.*

73. *Id.* (stating that the deadline to contest is approximately ten days). "While the verification process now runs relatively quickly for citizens, processing times will certainly increase if all employers are required to use the system." *Id.* Since the "contesting process is normally limited to [ten] working days," this may lead to employees not being able to contest a tentative nonconfirmation finding in a timely fashion. *Id.* at 5. If the employee fails to contest and receives a final nonconfirmation finding, the employer is required to terminate the employee within three days. *Id.* at 6.

in employees losing potential earnings.[74] Finally, Basic Pilot has a high rate of error; about twenty percent of employees originally disqualified are later found to be eligible for employment.[75]

Basic Pilot also results in a new unwanted problem. In response to greater attention to documentation validity, undocumented workers are no longer using counterfeit documents. Instead, they are now using stolen documents, or stolen information, leading to large increases in identity theft.[76] Not only will this cause even greater rates of error and longer processing times in the Basic Pilot program, but it is also a dangerous threat to consumers nationwide.[77]

The Immigration and Naturalization Service was previously tasked with investigating worksite enforcement of immigration laws; however, in 2002 it became the job of the newly created Department of Homeland Security's Immigration and Customs Enforcement (ICE).[78] With this

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74. *See id.* ("Because the DHS and SSA databases are not fully integrated and often have difficulty communicating with each other in an efficient manner, the practice can take two weeks or longer for noncitizens. This is simply too long for many employers to wait."). Even when a company does participate with the Basic Pilot Program, there are no guarantees. *Id.* at 8. Agents raided Swift & Company production facilities "despite the fact that Swift participated in the Basic Pilot Program." *Id.* "Swift has stated that the raids . . . cost the company $30 million." *Id.*

75. *See id.* ("It has been estimated that about [twenty] percent of all initial Basic Pilot Program entries are false-negatives, meaning that the applicant is originally thought to be not work eligible, but that a later review determines him or her to be work authorized."). Many errors are the result of simple mistakes, such as transposing the workers name or a recent name change for a married person. *Id.* These high number of errors result in "slowing the process even more." *Id.*; *see also* Wilson P. Dizard III, *CIS Expands Its Eligibility System, Upgrades Anticipate Reforms on Immigration, Will Allow Support for New State Laws and Real ID,* GOV'T COMPUTER NEWS, July 16, 2007, *available at* http://www.gcn.com/print/26_17/44649-1.html.

> DHS faced longstanding criticism over flaws in EEEVS' precursor system, the Basic Pilot Program, which generated frequent errors and attracted only 17,000 of the country's 5.9 million employers as voluntary members. Some critics cited the system's slow function and high error rate. Others pointed to gaps in its operation that allowed ineligible job applicants to get away with document fraud. *Id.*

76. *See Zamora*, 478 F.3d at 1175 (expressing that the new problem in unlawful verification is stolen documents). The use of forged documents is being extinguished because of the agencies shift to Social Security number verification. *Id.*

77. *See id.* (discussing the problems identity theft creates for consumers).

78. Sara Ines Calderon, *Employing Undocumented Workers Could Mean Jail Time for U.S. Jefes,* BROWNSVILLE HERALD, Dec. 18, 2005, *available at* http://www.brownsvilleherald.com/news/enforcement_68034__article.html /work_immigration.html ("Since 2002, work site enforcement investigating an employer[']s and his employees['] legal authorization to work in the country has been under the Department of Homeland Security[']s Immigration and Customs Enforcement or ICE. Before then, work site enforcement was a practice of Immigration and Naturalization Service[ ].").

shift in authority came a change in enforcement strategy.[79] ICE is ardently focused on employer sanctions and pledges to increase fines as well as criminal charges.[80] Initially, ICE's attention was directed towards immigration violations that raised security concerns.[81] This policy was developed amid fear and security concerns following the 9-11 terrorist attacks.[82] However, ICE has expanded its focus to also include employers and workers.[83] In effect, ICE was able to use the justifications for increased attention on dangerous undocumented individuals, such as terrorists, and intrinsically relate that fear into a holistic policy against all cases of undocumented immigrants. These two concerns, workplace immigration violations and terrorist threats, are obviously very different, and no terrorist has ever entered the United States from the southern border,[84] but ICE is treating them alike and with the same emphasis.

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79. *Id.* ("The handoff means a change in enforcement tactics . . . . ").

80. *Id.* ("[E]mployers should be aware that the switch would be from emphasizing fines to jail time.").

81. Julie Myers, *If You Hire Illegal Immigrants, Expect Criminal Charges, Seizure of Assets*, ST. PAUL PIONEER PRESS, July 11, 2006, at 8D (listing locations that are considered high priority: nuclear plants, air and sea ports, and military locations). The author of this article is the Assistant Secretary of Homeland Security for ICE. *Id.* "At first we focused our work-site enforcement efforts on illegal workers at critical-infrastructure locations such as nuclear and chemical plants, military installations, airports and seaports." *Id.*

82. *Id.* (explaining the date ICE was created). The DHS Homeland Security Deskbook explains that immigration law has been specifically affected by the events of September 11, 2001 because laws following the event regarding immigrants are designed to protect against future terrorist attacks. JAMES T. O'REILLY, HOMELAND SECURITY DESKBOOK, Chapter 9.01 (Matthew Bender 2007 Supp.).

> In contrast to most immigration laws and policies promulgated over the previous fifty years, which emphasized increasing commerce, spreading democracy, and promoting international relations, changes to U.S. immigration law and policy in the years following September 11 were designed solely to eliminate the risk of future acts of terrorism. The resulting immigration laws, regulations, and policies have become the United States's most obvious tool in the war on terror. *Id.*

83. Julie Myers, *If You Hire Illegal Immigrants, Expect Criminal Charges, Seizure of Assets*, ST. PAUL PIONEER PRESS, July 11, 2006, at 8D (explaining that the priorities are still security work sites, such as nuclear plants, air and sea ports, and military locations, but that ICE is also shifting some of its focus to traditional work sites).

84. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., STAFF STATEMENT NO. 1: ENTRY OF THE 9/11 HIJACKERS INTO THE U.S., at 1 (Aug. 21, 2004), http://govinfo.library.unt.edu/911/staff_statements/staff_statement_1.pdf ("None of the 9/11 attackers entered or tried to enter our country [across our land borders]."). After the 9/11 attacks, Congress and President George W. Bush started The National Commission on Terrorist Attacks Upon the United States, also known as the 9/11 Commission. *Id.* The independent, bipartisan commission's primary duties were to prepare a report on what lead up to the terrorist attacks, describe how the United States people responded to the attacks and to suggest ways to prevent future terrorist attacks. *Id.*

Evidence of these practices is seen in the recent ICE raids on worksites around the country. These policies are causing civil rights groups and labor unions to file lawsuits against ICE for constitutional civil rights violations.[85] Homeland Security chief Michael Chertoff alleged the raids were the result of investigation and were targeted to the Department's findings.[86] The groups dispute that the investigations were targeted and allege that the mass detentions were unlawful because the entire plant was detained in violation of constitutional search and seizure protections.[87]

In addition to increased reliance on raids, ICE wants to expand potential sanctions on employers from mere fines to asset seizures.[88] ICE believes that small fines are a large part of the problem because employers do not take them seriously, considering them part of their normal operating expenses. Consequently, the fines fail to serve their purpose as a de-

85. *See* Original Complaint–Class Action Request for Injunctive and Declaratory Relief and Damages Jury Demand on Damage Claims, United Food & Commercial Workers Int'l Union v. U.S. Dep't of Homeland Sec. (N.D. Tex. Sept. 11, 2007) (No. 2-07CV-188-J), 2007 WL 4825029, http://www.ufcw.org/docUploads/9-11-07SwiftRaidsComplaintFin.pdf?CFID=3912381&CFTOKEN=16828907 (complaining that ICE engaged in unlawful detention and unlawful arrests of workers at meat packing plants across the country); *see also* Mancha v. Immigration & Customs Enforcement, No. 06-2650, 2007 WL 3144012 (N.D. Ga. Oct. 24, 2007) (alleging racial profiling, harassment and discrimination by ICE agents in violation of the Fourth and Fifth Amendments).

86. Original Complaint–Class Action Request for Injunctive and Declaratory Relief and Damages Jury Demand on Damage Claims at 10, United Food & Commercial Workers Int'l Union v. U.S. Dep't of Homeland Sec. (N.D. Tex. Sept. 11, 2007) (No. 2-07CV-188-J), 2007 WL 4825029, http://www.ufcw.org/docUploads/9-11-07SwiftRaidsComplaintFin.pdf?CFID=3912381&CFTOKEN=16828907 (stating that during the Swift Raids, defendants engaged in mass detentions with administrative arrests totaling approximately 1139 persons. *Id.* Plaintiffs allege that these detentions failed to include only workers that were the subject of investigations by the Department of Homeland Security. *Id*

87. *See id.* at 10–13 (alleging that "defendants' policy, practice, custom and usage are to conduct warrantless arrests of plaintiffs and their proposed class members without any reason to believe they would escape before warrants could be obtained for their arrest."). *Id.* at 13. Plaintiffs further allege that these policies and customs are violative of the Immigration and Nationality Act and the Fourth and Fifth Amendments of the U.S. Constitution. *Id.*

88. Julie Myers, *If You Hire Illegal Immigrants, Expect Criminal Charges, Seizure of Assets*, ST. PAUL PIONEER PRESS, July 11, 2006, at 8D (discussing ICE proposal to increase the scope of sanctions used against employers by criminal prosecution and seizure of assets); *see* JAMES T. O'REILLY, HOMELAND SECURITY DESKBOOK, Chapter 9.03[3][b][v] (Matthew Bender 2007 Supp.) ("Unlike the former INS, ICE does not prefer to use fines and administrative hearings to combat illegal employment. Rather, ICE is more focused on criminal investigations and asset seizures.").

terrent.[89] Assistant Secretary of Homeland Security Julie Myers explains as follows:

> We can achieve far greater respect for the law among employers by bringing criminal prosecutions and seizing assets derived from illegal employment schemes. The prospect of [ten] years in federal prison and losing that new home and car to forfeiture has much sharper teeth than a small fine. This is the future of work-site enforcement.[90]

Workplace enforcement resulted in numerous problems for both employers and employees. Good immigration policy would take a holistic approach, beneficial to both employers and employees. Employers are overly burdened by this system and risk serious fines and potential criminal sanctions. The systems proposed and currently in place do not provide employers with the resources they need to meet the demands of laws with serious consequences. In addition, there are not enough laborers to meet their needs without the immigrant population. In the next twenty years, the United States will face a labor shortage.[91] Cutting off the labor force will not only be bad for employers, it will be bad for the United States economy.

In addition, requiring people to become documented will aid in the fight against terrorism because it will liberate resources and redirect them towards combating real threats of terrorism on the border.[92] Also, plans that legalize the undocumented workforce will shift the burden of verification from the employer to the government because the government will have the responsibility of verifying work eligibility. Because the burden would be on the government to verify workers, employers would have

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89. Julie Myers, *If You Hire Illegal Immigrants, Expect Criminal Charges, Seizure of Assets*, ST. PAUL PIONEER PRESS, July 11, 2006, at 8D (explaining that, under the INS strategy of simply fining employers for hiring illegal immigrants, it was ineffective, and did not adequately deter employers from hiring illegal workers).

90. *Id.* (quoting the Assistant Secretary of Homeland Security for ICE).

91. Sara Ines Calderon, *Employing Undocumented Workers Could Mean Jail Time for U.S. Jefes,* BROWNSVILLE HERALD, Dec. 18, 2005, *available at* http://www.brownsvilleherald.com/news/enforcement_68034___article.html /work_immigration.html ("A labor shortage will be growing in the next 20 years . . . ."); *see* Meg Richards, *As Boomers Retire Labor Shortages Will Grow,* DESERET NEWS (Salt Lake City), Oct. 5, 2003, *available at* http://findarticles.com/p/articles/mi_qn4188/is_20031005/ai_n11424915.

> Experts say that in the not-so-distant future, America will have more jobs than it can fill. The baby boom generation, born between 1946 and 1965, reshaped the U.S. economy with a seemingly inexhaustible supply of highly educated workers. But their children are not numerous enough to replace them, and researchers say a serious labor shortage lies ahead. *Id.*

92. Bill Hing, Op-Ed., *The Moral Choice in Immigration Policy*, JURIST, Apr. 6, 2006, *available at* http://jurist.law.pitt.edu/forumy/2006/04/moral-choice-in-immigration-policy.php (discussing security issues that would be solved by documenting the labor force).

neither the justification nor the motivation to avoid hiring employees based on national origin. These ideas were proposed in the most recent attempt at comprehensive immigration reform in Congress proposed by Senators Ted Kennedy and John McCain.[93] The McCain-Kennedy-Kolbe-Flake-Gutierrez Bill proposes a new temporary visa, available to a set number of workers based on U.S. labor needs.[94] This plan, however, does not go far enough to address the rights of workers who deserve a viable path to citizenship.

Conventional wisdom believes that either enforcing or strengthening the "laws on the books" will solve both the problems of illegal immigration and security threats from abroad. However, the laws, written in the 80s, were ineffective because the employers' need for laborers outweighed the need to control the flow of immigrants and regulate employers. This trend will continue as the United States faces an impending labor shortage. The way to deal with the problem of illegal immigration is to accept the flow of immigrants by legalizing the labor force. Creating a system where it is as easy to become a documented worker as it is to obtain a job will control the flow of individuals who enter illegally, by making it advantageous for them to enter legally. Increasing the number of workers employers need for hard labor jobs, not just criminalizing and punishing the hiring, will reduce the number of illegal hires because the need for illegal workers will truly be diminished. In addition, security resources will be freed up by diminishing targets on employers so time can be spent on dangerous and catastrophic threats to the United States.

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93. *Id.* (proposing the legalization of illegal immigrants in order to legalize illegal immigrants and provide a path to citizenship).

94. Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005) (introducing legislation by Senators McCain, Kennedy, Brownback, Lieberman, Graham, and Salazar as a bill "[t]o improve border security and immigration."); *see* Crystal Patterson, McCain-Kennedy-Kolbe-Flake-Gutierrez Bill at a Glance, http://tedkennedy.com/journal/75/mccain-kennedy-kolbe-flake-gutierrez-bill-at-a-glance (last visited Oct. 26, 2008) (itemizing the provisions in the proposed bill).

> Title III: Essential Worker Visa Program
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> [1.] Creates a new temporary visa to allow foreign workers to enter and fill available jobs that require few or no skills (the H-5A visa)
>
> [2.] Applicants must show that they have a job waiting in the U.S., pay a fee of $500 in addition to application fees, and clear all security, medical, and other checks.
>
> [3.] Requires updating of America's Job Bank to make sure job opportunities are seen first by American workers.
>
> [4.] Initial cap on H-5A visas is set at 400,000, but the annual limit will be gradually adjusted up or down based on demand in subsequent years.

III. LEGAL ANALYSIS.

A. *No-Match Letters: DHS's Plan to Strengthen the "Laws on the Books"*

In August of 2007, the Department of Homeland Security introduced a new regulation increasing the burden on employers to verify employment eligibility.[95] DHS wanted greater access to information that would help in its plan to aggressively attack illegal employment.[96] DHS wanted access to the Social Security database to use it to seek out leads to find illegal immigrants.[97] The new version of the rule furthered these goals by adding two new situations that equate to an employer having constructive knowledge of an employee's ineligibility to work in the United States.[98] Currently, when an employer submits a W-2 form and the name and Social Security number do not match with the Social Security Administration records, the SSA sends the employer a no-match letter.[99] The U.S. Immigration and Customs Enforcement also sends a similar letter, called a "Notice of Suspect Documents," to inform employers when an I-9 Employment Eligibility Verification form does not match agency records for eligibility.[100] The new regulation increases the obligation on employers to take action to verify documents upon receipt of one of these letters.[101]

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95. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a) (introducing new requirements on employers to ensure they are employing people legally authorized to work). The proposed rule drew over 5000 comments in response, drawing ire from some groups and support from others. *Id.*

96. Rebecca Riddick, *Nervous Employers Re-Examine Practices in Wake of Immigration Raids,* DAILY BUS. REV., Sept. 15, 2006, *available at* http://www.law.com/jsp/article.jsp?id=1158224722634 ("Under current law, ICE does not have access to information possessed by the Social Security Administration.").

97. *Id.* (discussing how DHS wants to change the law so it can use Social Security information to find unlawful citizens rather than to use Social Security information merely as evidence to prosecute once an unlawful citizen has been found).

98. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a) (discussing the effects of the final rule). "[The final rule] amends the definition of 'knowing' in 8 C.F.R. § 274a1(l)(1) (2006), in the portion relating to 'constructive knowledge.'" *Id.*

99. *Id.* at 45,612 (explaining the SSA procedure for informing employers when there is a discrepancy in information). Millions of earnings reports contain employee names and Social Security numbers that do not reflect the SSA's records. *Id.* A "no-match," or "Employer Correction Request," is sent back to the employer. *Id.* In many cases, the cause of the mismatch is clerical or mistake due to name changes. *Id.*

100. *Id.* (stating the ICE procedure for informing employers when there is a discrepancy in information). Upon completion of the Form I-9, it is given to DHS investigators on request and is held by the employer. *Id.*

101. *Id.* at 45,613 (stating the new requirements made by this rule). The regulation directs an employer on its obligations under immigration laws, and contains instructions on

The law states, "It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."[102] The new regulation adds to the provision of "knowing" by expanding this law's characterization of constructive knowledge.[103] It adds two examples where an employer is considered to have knowledge that an employee is not eligible to work in the United States: The additional (1) Written notice to an employer from SSA, e.g. an "Employer Correction Request," that the combination of name and SSN submitted for an employee does not match SSA records; and (2) Written notice from DHS that the immigration status document, or employment authorization document, presented or referenced by the employee in completing Form I-9 was assigned to another person, or that there is no agency record that the document was assigned to anyone.[104]

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how to avoid liability upon receipt of a letter from the SSA or DHS. *Id.* The rule specifically states what responses to a "no-match" letter will indemnify the employer from liability for constructive knowledge. *Id.*

102. 8 U.S.C.A. § 1324a(a)(2) (West 2008) (stating employer requirements to verify worker eligibility when hiring a new employee or when an employee falls out of eligibility); *see* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,612 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

103. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,612 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a) (differentiating between the new rule and the prior rule). The current regulation stipulates, "The term 'knowing' includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." *Id.* The new rule separates references of actual and constructive knowledge. *Id.* However, it will maintain the same definition of constructive knowledge, which is knowledge "that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition." *Id.*

104. *Id.* (stating the new law). Additionally, the new law provides steps a reasonable employer should take when receiving one of these letters. *Id.* First, the employer should check its own records to make sure the error is not clerical on its side. *Id.* This should be done within thirty days for timely consideration and the relevant agency should be notified regarding any corrections that need to be made. *Id.* If this does not solve the discrepancy, the employer should contact the employee to ensure that the record he or she turned in is correct. *Id.* If the record needs to be adjusted, the employer should contact the relevant agency regarding the corrected information. *Id.* If the error is not discovered through either of the above referenced checks, the employer should require the employee to reverify his or her status by filling out a new I-9 form, treating the employee as if he or she were a new hire. *Id.* The employer could not use the manner of identification that is subject to the no-match letter and could not use any document to verify identity that did not contain a photograph. *Id.* If after all these procedures the employer is still unable to verify work eligibility of an employee, the employer should either fire the employee or risk a DHS finding that the employer had constructive knowledge that the employee was unau-

This proposed rule would let ICE officials use no-match letters as proof that an employee was knowingly hired in violation of immigration law.[105] DHS explains the new rule in a way that makes it seem as if it is merely trying to make things more clear for employers,[106] however, what it is actually doing is increasing an employer's responsibility and burden by expanding the definition of constructive knowledge.[107]

When Congress passed the IRCA in 1986, it made it illegal for an employer to knowingly hire someone unauthorized to work in the United States or to continue to hire someone who is unauthorized to work in the United States.[108] The law does not specify exactly what constitutes employer knowledge that an employee or potential employee is unauthorized.[109] The definition of knowledge has been developed through case law.

1. Constructive Knowledge as It Currently Exists

Constructive knowledge was first addressed in *Mester Manufacturing Co. v. Immigration and Naturalization Service.*[110] In *Mester*, an INS agent told the employer that his employees were using false green cards, yet the

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thorized to work, facing fines, or even criminal sanctions for violation of INA 274A(a)(2). *Id.*

105. Rebecca Riddick, *Nervous Employers Re-Examine Practices in Wake of Immigration Raids,* DAILY BUS. REV., Sept. 15, 2006, *available at* http://www.law.com/jsp/article.jsp?id=1158224722634 (explaining the effect of the new law).

106. U.S. Immigration and Customs Enforcement, Safe Harbor for Employers Who Receive a No-Match Letter, http://www.ice.gov/partners/employers/safeharbor/index.htm (last visited Oct. 26, 2008).

> Through regulation, the Department of Homeland Security (DHS) is reiterating that employers remain accountable for the workers they hire and clarifying the steps employers should take to resolve mismatches identified in letters issued by SSA. The DHS regulations provide guidance that will help employers comply with legal hiring requirements by outlining specific steps they should take under immigration law when they are notified that employees' names or corresponding Social Security Numbers as provided on Forms W-2 do not match SSA records. *Id.*

107. *See generally* United States v. Am. Terrazzo Corp., 6 OCAHO 828, 1995 WL 848945, at *5 (Dec. 13, 1995) (analyzing constructive knowledge, saying that such doctrine must be sparingly applied).

108. 8 U.S.C.A. § 1324a(a) (West 2008).

109. Mester Mfg. Co. v. INS, 879 F.2d 561, 566–67 (9th Cir. 1989) (stating that when an employer received notice that a green card was fraudulent but did nothing to correct the matter, the employer was on constructive notice that the employee was not authorized to work in the United States). "The statute does not require that the knowledge come to the employer in any specific way." *Id.* at 566. The court specifies that it will use preponderance of the evidence to determine whether an employer consciously employed an unauthorized alien. *Id.*

110. *Id.* at 563–66 (specifying that IRCA was being reviewed for the first time in a federal appellate court). "We consider the constitutionality of IRCA as a legal question of

employer allowed his workers to continue working.[111] Appellant argued that he did not have knowledge that the employees were unauthorized to work because he had not been given written notice from the INS to that effect.[112] The court reasoned that the knowledge component was met because the verbal INS direction that the employee documents were fraudulent was enough to constitute constructive knowledge that the employees were not authorized for employment.[113]

Constructive knowledge was further developed in *El Rey Sausage Co. v. United States Immigration and Naturalization Service.*[114] Here, an INS

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first impression." *Id.* The eighteen months following the passage of IRCA were used to gradually phase in the regulations, and this case arose during this time. *Id.* at 563.

111. *Id.* at 566 (stating that Mester was informed on September 3, 1987 that his employees were using false documents but were still employed on September 25, 1987). A Border Patrol agent gave Mester the names of its employees suspected to be using fake alien registration cards, as well as a citation for employees whose work authorizations had expired. *Id.* at 564.

> [T]he INS served a Notice of Intent to Fine ("NIF") on Mester on October 2, alleging that several named employees had been in continued employment after Mester had learned on September 3, 1987 (presumably from the citation or other accompanying verbal information) that they were not authorized to work, all in violation of 8 U.S.C. §1324(a)(2) (the "employment violations"). *Id.* (footnote omitted).

112. *Id.* at 566–67 (discussing appellant's rationale for stating he did not meet the knowledge requirement). "Mester contends, as a matter of law, that it did not have knowledge of the status of the aliens in counts 1–3 sufficient to find it liable because the form of notice was improper." *Id.* The court found that even if Mester had received instructions more formally, it might have followed them. *Id.* "However, such speculation does not negate the offense." *Id.*

113. *Id.* at 567 (introducing a constructive knowledge standard into employer duties). This case also points out an important concern regarding the potential for discrimination. The court asks when it is necessary for an employer to terminate an employee who is not or has become ineligible for employment. *Id.* at 567. The case recognizes the burden employers face when forced to balance competing legal interests. On one hand, an employer may face penalties for violating immigration laws, and on the other, may face suits regarding claims of other labor and employment laws. *Id.* The court implies frustration with the legislation for not clarifying this standard. *Id.* at 566–67. "It appears that the INS wishes to proceed on an entirely *ad hoc* basis that will undoubtedly force this court to sketch out some standard of reasonableness in future litigation." *Id.* The court decided here that a two-week delay in firing the employee was a violation of the law. *Id.* at 568.

114. *See generally* New El Rey Sausage Co. v. INS, 925 F.2d 1153 (9th Cir. 1991) (holding that a letter from the INS, along with verbal notice from an INS agent, is sufficient to put an employer on constructive notice). After questioning, an administrative law judge concluded that the employer, New El Rey, had constructive knowledge based on INS letter notifying El Rey that certain employees were determined to be unauthorized. *Id.* at 1159. The letter stated to El Rey that "[u]nless these individuals can provide valid employment authorization . . . they are considered unauthorized aliens." *Id.* Additionally, the court determined that a verbal notice from an INS agent provided constructive notice. *Id.* An INS agent explained to New El Rey "[y]our people on this list do not have valid employment authorization." *Id.*

agent informed the employer that nine employees had problems with the employment authorization.[115] Upon receiving this information, the employer simply reviewed the relevant I-9 forms and asked the employees if they were eligible to work to which they said they were authorized, and the employer accepted their attestation without asking to see further documentation.[116] The court held this was not adequate diligence under the law and the employer was found to be in violation of the statute.[117] The court determined the Legislature intended to place part of the burden of proving employment eligibility on the employer.[118] In doing so, the court clarified that the employer's duty is to refrain from hiring an undocumented worker or let an employee go that has fallen out of status, and

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115. *Id.* at 1155 (referring to the hand delivered letter provided by an INS agent to New El Rey on May 25, 1988). The letter provided to New El Rey stated the following:

> This letter is to inform you that, according to the records of the United States Immigration and Naturalization Service, the alien registration cards submitted to you were found to pertain to other individuals, or there was no record of the alien registration number being issued. Unless these individuals can provide valid employment authorization from the United States Immigration and Naturalization Service, they are to be considered unauthorized aliens, and are therefore not authorized to be employed in the United States. Their continued employment could result in fine proceedings . . . . *Id.*

The review process performed by the INS agent included a "notice of inspection" to New El Rey, a review of its employees' I-9 forms, and confirmation of those forms against the INS's "Central Index System." *Id.* The INS agent determined that "alien registration numbers provided by New El Rey for nine employees were either nonexistent or had been issued to someone else." *Id*

116. *Id.* (describing the effort made by New El Rey to verify the employment of its employees after the May 25th letter). Seven of the nine employees at issue had resigned from their employment either prior to, or subsequently after, notification of the INS letter. *Id.* "On June 15, 1988, the INS obtained a district court order to search New El Rey's facility and its employment records. During the search on June 22, 1988, the agents found payroll records that reflected Rigoberto Gutierrez-Guzman's and Martin Campos-Vasquez's continued employment." *Id.* New El Rey was charged with two counts regarding deficiencies with Guzman's and Vasquez's employment paper work and two counts of knowingly hiring unauthorized workers; both charges were in violation of the Immigration and Nationality Act, 8 U.S.C. § 1324(a). *Id.*

117. *Id.* at 1158 (holding that employers "have an affirmative duty to determine that their employees are authorized"). The court found that when the INS notifies an employer that an employee's authorization documents (i.e., I-9 form) are not valid it puts the employer in the same position as if the employee had not provided any documentation at all. *Id.*

118. *Id.* (referring to H.R. Rep. No. 682, 99th Cong., 2d Sess. pt. 1, at 57 (1986), *reprinted in* U.S.C.C.A.N. 5649, 5661). "The Committee does not intend to impose a continuing verification obligation on employers. However, if an employer has knowledge that an alien's employment becomes unauthorized due to a change in nonimmigrant status for which work permission is authorized, sanctions would apply." *Id.*

also to verify that the documents are correct and themselves legal.[119] Thus, the entire burden is not on the government to prove that documents are false and employees are ineligible.[120] Rather, the employer has the duty to inspect the appropriate documents to verify whether the employee is eligible.[121] Through this, the balance of the burden is on the

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119. *New El Rey,* 925 F.2d at 1158 (citing the employers responsibility under the Code of Federal Regulations). "[I]f an employee's authorization expires, the employer must update the employee's I-9 form. To do this, the employee must present further documentation which the employer must review. This regulation is analogous to the situation here, where rather than expiring, it was found to be invalid." *Id.* Thus, New El Rey's action of only asking employees if their cards were valid was found, by the court, to be insufficient. *Id.* at 1159.

120. *Id.* (correcting New El Rey's assertion that the entire burden of proving up an employee's authorization status rested with the government). The court determined that the burden of authorization determination is partially placed on the employer under the Immigration Reform and Control Act of 1986 (IRCA). *Id.*

121. *Id.*; *see* 8 U.S.C.A. § 1324a(b)(1)(B)-(D) (West 2008) (listing the relevant documents for employee verification).

> (B) Documents establishing both employment authorization and identity
> A document described in this subparagraph is an individual's—
> (i) United States passport;
> (ii) resident alien card, alien registration card, or other document designated by the Attorney General, if the document—
> (I) contains a photograph of the individual and such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this subsection,
> (II) is evidence of authorization of employment in the United States, and
> (III) contains security features to make it resistant to tampering, counterfeiting, and fraudulent use.
> (C) Documents evidencing employment authorization
> A document described in this subparagraph is an individual's—
> (i) social security account number card (other than such a card which specifies on the face that the issuance of the card does not authorize employment in the United States); or
> (ii) other documentation evidencing authorization of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section.
> (D) Documents establishing identity of individual
> A document described in this subparagraph is an individual's—
> (i) driver's license or similar document issued for the purpose of identification by a State, if it contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this section; or
> (ii) in the case of individuals under 16 years of age or in a State which does not provide for issuance of an identification document (other than a driver's license) referred to in clause (i), documentation of personal identity of such other type as the Attorney General finds, by regulation, provides a reliable means of identification. *Id.* (footnote omitted).

employer to police the documents allegedly issued by the government to the particular individual.

In *United States v. Buckingham Ltd. Partnership*, the employee was authorized to work when he was hired; however, his employment verification subsequently expired.[122] The employer testified that he knew the employee was eligible to work when hired and believed his eligibility continued; therefore, the employer reasoned that it was an unintentional oversight on its part that the employee, who became ineligible post-employment, remained in employment.[123] The court disagreed, ruling that intent to employ was not the standard to meet the knowledge requirement as "it is enough that [the employer] should have known of that unauthorized status and failed to act."[124] The court reasoned that the intent standard was too high because it would provide a loophole for employers to skirt responsibility under the law.[125] The court feared the employers would avoid acquiring knowledge to protect themselves when they were hiring employees they believed may be unauthorized to work.[126]

In *Collins Foods International, Inc. v. United States Immigration and Naturalization Service*, the court emphasized that constructive knowledge is a limited doctrine and should be sparingly applied.[127] In this case, an employee was offered a job over the phone.[128] When the employee showed up for work, he was not allowed to begin before showing proof

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122. United States v. Buckingham Ltd. P'ship, 1 OCAHO 151, 1990 WL 511971, at *3-4 (Apr. 6, 1990) ("Mr. Stevens testified that he hired Rivera in 1987, and that at that time Rivera had proper work authorization . . . . At the time of the inspection, however . . . Rivera's employment authorization had expired . . . .").

123. *Id.* at *4 ("I knew that he had proper work identification and authorization when I hired him, and that was just a mistake, an oversight on my part by not checking to see that it had expired . . . . I believed it was still valid . . . . It was just an error on my part.").

124. *Id.* at *7 (reasoning that intent to employ a person "without regard to his employment authorization" is not required for a finding of knowledge.). "[F]ailure to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law." *Id.*

125. *Id.* (expressing fear that too high a standard was against legislative intent). "To hold that liability attaches only when it is proven that an employer specifically intended to continue to employ an unauthorized alien would minimize the Act's effectiveness by providing a loophole with which to escape liability . . . ." *Id.*

126. *Id.* (expounding on the fear of abuse of the law). "[T]o do otherwise would encourage an employer to consciously avoid acquiring knowledge of the employees immigration status whenever the employer suspects . . . that his employee is an illegal alien." *Id.* (quoting United States v. Collins Food Int'l, OCAHO Case No. 8900084, at 11 (Feb. 8, 1990)).

127. Collins Food Int'l, Inc. v. INS, 948 F.2d 549, 554-55 (9th Cir. 1991) ("The doctrine of constructive knowledge has great potential to upset that balance, and it should not be expansively applied.").

128. *Id.* at 550.

that he was authorized for employment in the United States.[129] The employee later returned with a driver's license for identification and a fake Social Security card to prove work eligibility.[130] The court held the employer did not have constructive knowledge that its employee was ineligible to work.[131] First, it is not, as a matter of law, constructive knowledge to extend employment to someone without first checking their employment documents.[132] The court pointed out that the regulation considered this to be normal procedure and that the true starting point for potential violations began when the employee was actually employed in pursuit of wages; in other words, actually performing work.[133] In addition, the court said that an employer who makes too many inquiries prior to hiring regarding a potential employee's national origin, citizenship status, or race, might put the employer in danger of claims of discriminatory hiring practices.[134] Also, pushing the time to verify up to when an offer is extended would likely lead to employers avoiding hiring people whose appearance, race, or manner of speaking suggests immigrant status because an employer would be fearful of even extending the offer to begin with.[135] Finally, the court determined that it was not the employer's fault where the employee presented a false document for verification.[136] "Congress did not intend the statute to cause employers to become experts in identifying and examining a prospective employee's employment authorization documents."[137] The court again expressed fear that taking

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129. *Id.* (emphasizing the employer's attempt to verify the employee's work status).

130. *Id.* at 550–51 (describing the documentation that the employee returned with in order to prove his authorization and ability work).

131. *Id.* at 551 (agreeing with the administrative law judge's factual conclusions, but disagreeing that those conclusions resulted in constructive knowledge under the relevant statute).

132. *Collins*, 948 F.2d at 551 (ruling hiring without checking documents first is not prima facie evidence that an employee is ineligible to work).

133. *Id.* at 551–52 (discussing when violations begin).

134. *Id.* at 552 (expressing fear that premature questioning might put an employer in the line of fire for discriminatory hiring lawsuits).

135. *Id.* (discussing the possibility that this might increase discrimination by leading employers to avoid hiring people who look foreign).

136. *Id.* at 553–54 (explaining how it was not the employer's fault where the employee presented a fake Social Security card that did not match the one in the INS manual).

137. Collins Food Int'l, Inc. v. INS, 948 F.2d 549, 554–55 (9th Cir. 1991) (discussing the minimal role Congress intended employers to play in verifying employee documents). The court furthers this point by discussing a Judiciary Committee Report:

> It is not expected that the employers ascertain the legitimacy of documents presented during the verification process. The "reasonable man" standard is to be used in implementing this provision and the Committee wishes to emphasize that documents that reasonably appear to be genuine should be accepted by employers without requiring further investigation of those documents. *Id.* (footnote omitted).

the knowledge provision to the level of requiring all employers to correctly identify all false documents could lead to discrimination.[138] The court concluded by clarifying that this case does not rise to the level of "willful blindness," stressing that this would be an expansion beyond that point and consequently would not serve the intent of Congress.[139]

The doctrine of constructive knowledge states where an employer reasonably should know that an employee is undocumented, but blatantly ignores, or prevents itself from discovering the truth, the employer is deemed to meet the knowledge requirement of the statute.[140] However, the doctrine is limited to that definition, because a broader interpretation would be unfairly burdensome to employers who cannot be wholly responsible for the document fraud of their employees.[141] In addition, a broad definition of constructive knowledge would result in discriminatory hiring that would negatively affect the job opportunities of legal minority job seekers.[142]

2. The Employee Verification Process

Employer knowledge of work eligibility usually originates through the verification process when hiring a new employee.[143] Current law states that employers must check the eligibility documents of employees within three days of a new hire as well as verify the employee's I-9 form.[144] Employers have to be diligent in this process because they are liable for defects in the I-9 form.[145] However, employers are not liable for techni-

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138. *Id.* ("To guard against unknowing violations, the employer may, again, avoid hiring anyone with an appearance of alienage.").

139. *Id.* at 555 (differentiating the case at hand as distinctly lacking the "willful blindness" found in earlier cases); *see* Hernandez v. Balakian, 480 F. Supp. 2d 1198, 1209 (9th Cir. 2007) ("[The statute] provides that an employer satisfies its verification obligation by examining a document which 'reasonably appears on its face to be genuine.'").

140. *See* 8 C.F.R. §274a.1(l) (2007).

141. *See Collins*, 948 F.2d at 555 (suggesting that the doctrine of constructive knowledge "should not be expansively applied").

142. *See id.* at 552 (positing that conflicting demands placed upon employers could result in discrimination because employers would just avoid interviewing "any applicant whose appearance suggests alienage").

143. *See* 8 U.S.C.A. §1324a(a)(1)(b) (West 2008).

144. 8 C.F.R. § 274a.2(b)(1)(i)-(ii) (2008) (stating procedures employers should go through to check new hires' employment eligibility). Employers must properly review the I-9 forms and provide assistance for any matters necessary relating to the I-9 forms. *Id.* Once the I-9 forms have been signed and submitted by the new hire, the employer must verify and sign off on the document within three days. *Id.* The employer must review the validity of the documents by ensuring that "the documents presented appear to be genuine and to relate to the individual." *Id.*

145. *See id.* (describing employer liability when reviewing an I-9). Reviewing a new hire's I-9 form must be done by the employer and must comply with the allowed methods

cal or procedural failure to meet verification requirements.[146] In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act which added a good-faith compliance element designed to protect employers who substantially complied with the verification procedures.[147] The employer must be careful when developing procedures for verifying the employee's documents because the employer might be in violation of the Unfair Immigration Employment Practices if it demands specific documents to comply with its own internal verification process.[148] It must accept all allowable documents or face having to defend itself against a suit claiming discriminatory intent.[149] This issue arose in *Robin-*

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of employment eligibility. *Id.* The employer must provide assistance where necessary in order to properly file the I-9 form. *Id.*

146. United States v. Anthony Borrelli and Sons, Inc., 8 OCAHO 1027, 1999 WL 608819, at *3 (Mar. 15, 1999) (denoting the proper determination of good faith based on the submission of an employee's I-9 form). The Immigration and Nationality Act provides an affirmative defense of good faith. *Id.* However, there are two exceptions in which the good faith compliance will not suffice:

> (B) Exception if failure to correct after notice
> Subparagraph (A) [Good Faith Compliance] shall not apply if–
> (i) the Service (or another enforcement agency) has explained to the person or entity the basis for the failure,
> (ii) the person or entity has been provided a period of not less than 10 business days (beginning after the date of the explanation) within which to correct the failure, and
> (iii) the person or entity has not corrected the failure voluntarily within such period.
> (C) Exception for pattern or practice violators
> Subparagraph (A) [Good Faith Compliance] shall not apply to a person or entity that has or is engaging in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section. *Id.*

147. 8 U.S.C.A. § 1324a(b)(6) (West 2008).

> (6) Good faith compliance
> (A) In general
> Except as provided in subparagraphs (B) and (C), a person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement. *Id.*

148. *See* 8 C.F.R. § 274a.2(b)(1)(v) (2008) (stating the available methods of employment verification). Employment verification that may be presented by the individual is for establishing employment authorization and identity. *Id.*; *see also* Robinson Fruit Ranch, Inc. v. United States, 147 F.3d 798, 801–02 (9th Cir. 1998) (discussing prohibited compliance with the law).

149. *See generally* Robinson Fruit Ranch, Inc. v. United States, 147 F.3d 798 (9th Cir. 1998) (distinguishing that employer's practice of requesting two forms of identification from all new employees did not appear to have a discriminatory intent). Therefore, the employer's procedure was not a violation of the "document abuse" provision of the Immigration Reform and Control Act. *Id.* at 802. Section 2 of the I-9 labeled "Employer Review and Verification," lists out three categories of documents that an employer must examine and verify to be authentic. *Id.* at 800. An employee may present a document from List A which establishes identity and work eligibility; otherwise, an employer may

son Fruit Ranch, Inc. v. United States where an employer tried to protect itself by requiring some applicants to show two forms of identification where just one document would have been sufficient under the law.[150] This practice was potentially a violation of 8 U.S.C. § 1324b(a) which states that it is an unfair practice to require more or different documentation from an individual based on their national origin or citizenship status.[151] The court concluded that there must be an element of discrimination for an employer to be found guilty under this statute; however, an employer who requires extra documentation from an alien above what it requires from a citizen is a strong discriminatory factor because it makes completing an I-9 form more difficult for a non-citizen than it would for a citizen.[152]

While beneficial for employees, this makes it very difficult and confusing for employers to determine how to follow the statute. On one hand, employers need to protect themselves from potential fines based on constructive knowledge that an employee was actually not authorized to work. On the other hand the employer can not ask for too much proof of eligibility or it faces another violation of the law, potentially implementing practices that discriminate against employees who are authorized to

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present a document from List B and List C which, coupled together, establish identity and work eligibility. *Id.*

150. *See id.* at 800 (discussing the good-faith defense under the Illegal Immigation Reform and Immigration Responsibility Act). From 1990 to 1993, the Immigration and Nationality Act contained no requirement for intent to discriminate. *Id.* at 799. It provided "[an employer]'s request, for purposes of satisfying the requirements of [the Immigration and Nationality Act], for more or different documents than are required under such subsection or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals." *Id.* In 1996, the Legislature added language that provided a requirement of intent to discriminate into the Act. *Id.* Under the 1996 amended language, the described documentary requests would be considered unfair employment methods "if made for the purposes or with the intent of discriminating against an individual in violation of paragraph (1) [of the general anti-discrimination provision]." *Id.*

151. 8 U.S.C.A. § 1324b(a)(1) (West 2006) ("It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual . . . with respect to the hiring, or recruitment or referral for a fee, of the individual for employment . . . because of such individual's national origin, or . . . because of such individual's citizenship status."); 8 U.S.C.A. § 1324b(a)(6) (West 2008).

> A person's or other entity's request, for purposes of satisfying the requirements of section 274A(b), for more or different documents than are required under such subsection or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice . . . . *Id.*

152. *Robinson*, 147 F.3d at 801 ("Therefore, an employer might well be guilty of discrimination by creating unnecessary and discriminatory obstacles to hiring, regardless of whether applicants are able to surmount them.").

work. This is even more confusing and potentially dangerous. An employee faced with this catch-22 is likely to simply avoid hiring people who appear foreign to protect itself from all potential violations. Of course, this is also risky, as an employer making that choice is employing discriminatory hiring practices and is potentially setting itself up for Title VII suits.

3. Answering the Knowledge Question Through Electronic Verification?

The government attempted to clear up problems in the verification system that cause knowledge issues by trying to lessen the burden on employers through electronic verification.[153] However, the available programs are riddled with errors and problems.[154] In 1998, INS began the Basic Pilot Program, which allows employers to electronically check their employees I-9 information against Social Security and DHS databases to figure out whether an employee is authorized to work.[155]

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153. RICHARD M. STANA, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-895T, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORT 5 (June 19, 2006), http://www.gao.gov/new.items/d06895t.pdf.

> The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 required INS and SSA to operate three voluntary pilot programs to test electronic means for employers to verify an employee's eligibility to work, one of which was the Basic Pilot Program. The Basic Pilot Program was designed to test whether pilot verification procedures could improve the existing employment verification process by reducing (1) false claims of U.S. citizenship and document fraud; (2) discrimination against employees; (3) violations of civil liberties and privacy; and (4) the burden on employers to verify employees' work eligibility. *Id.*

154. *See generally id.* at 3.

> [A] number of weaknesses in the pilot program's implementation, including its inability to detect identity fraud and DHS delays in entering data into its databases, could adversely affect increased use of the pilot program, if not addressed. In addition, USCIS officials told us the current Basic Pilot Program may not be able to complete timely verifications if the number of employers using the program significantly increased. *Id.*

155. *Id.* at 5.

> The Basic Pilot Program provides participating employers with an electronic method to verify their employees' work eligibility. Employers may participate voluntarily in the Basic Pilot Program, but are still required to complete Forms I-9 for all newly hired employees in accordance with IRCA. After completing the forms, these employers query the pilot program's automated system by entering employee information provided on the forms, such as name and [S]ocial [S]ecurity number, into the pilot Web site within [three] days of the employees' hire date. The pilot program then electronically matches that information against information in SSA and, if necessary, DHS databases to determine whether the employee is eligible to work. *Id.*

The program then electronically notifies the employer whether the particular employee is eligible to work.[156]

A recent Government Accountability Office report found several problems with Basic Pilot that would prohibit it from being immediately effective.[157] ICE wants to use the Basic Pilot Program to generate leads on which to base investigations.[158] For example, multiple queries of the same Social Security number might mean more than one person is using it, and multiple queries on the same number by one employer might mean that an employer is using the same number in an attempt to go through the motions to protect itself from sanctions.[159] The fear is that this will create a disincentive for employers to comply with the program because it could open them up to unwanted investigation.[160] In addition, Basic Pilot is not able to detect identity theft.[161] Currently, the biggest problem in false authorizations is false documents; however, a greater reliance on standardized verification practices would lead to increases in identity fraud, which is a dangerous threat to all who are authorized to work.[162] DHS has proposed the employer verification system be en-

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156. *Id.* ("The Basic Pilot Program electronically notifies employers whether their employees' work authorization was confirmed.").

157. *See generally id.* at 3.

158. RICHARD M. STANA, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-895T, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORT 10 (June 19, 2006), http://www.gao.gov/new.items/d06895t.pdf.

> Although ICE has no direct role in monitoring employer use of the Basic Pilot Program and does not have direct access to program information, which is maintained by USCIS, ICE officials told us that program data could indicate cases in which employers do not follow program requirements and therefore would help the agency better target its worksite enforcement efforts toward those employers. *Id.*

159. *Id.* (providing examples of ways ICE would use Basic Pilot information).

160. *Id.* at 11 (discussing why employers would avoid using the Basic Pilot Program).

161. *Id.*

162. *Id.* ("If an unauthorized worker presents valid documentation that belongs to another person authorized to work, the Basic Pilot Program would likely find the worker to be work-authorized.").

> Although the Basic Pilot Program may enhance the employment verification process and a mandatory program could assist ICE in targeting its worksite enforcement efforts, weaknesses exist in the current program. For example, the current Basic Pilot Program cannot help employers detect identity fraud. If an unauthorized worker presents valid documentation that belongs to another person authorized to work, the Basic Pilot Program would likely find the worker to be work-authorized. Similarly, if an employee presents counterfeit documentation that contains valid information and appears authentic, the pilot program may verify the employee as work-authorized. *Id.*

hanced to include a photo incorporation tool so employers can "make a visual match of identical photos."[163]

Another problem with Basic Pilot is about fifteen percent of verifications require reverification, which can take up to two weeks to complete.[164] This puts further burden on employers who need employees immediately. Employers will not want to do something that is against their economic interests. This will likely result in more discriminatory hiring practices because employers will avoid hiring aliens authorized to work or people with foreign appearance when their employment could be seen as leading to potential delays in business.[165] Also, there is currently not enough staff to man the verification system should the number of inquiries significantly increase in the near future.[166]

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163. RICHARD M. STANA, U. S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-895T, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 11 (June 19, 2006), http://www.gao.gov/new.items/d06895t.pdf (discussing how remarkable electronic verification is, and how the government is fixing all its problems).

164. *Id.* (citing statistics from Basic Pilot use in 2004).

> Although the majority of pilot program queries entered by employers are confirmed via the automated SSA and DHS verification checks, about [fifteen] percent of queries authorized by DHS required secondary verifications by immigration status verifiers in fiscal year 2004. According to USCIS, cases referred for secondary verification are typically resolved within 24 hours, but a small number of cases take longer, sometimes up to [two] weeks, due to, among other things, delays in entry of data on employees who received employment authorization documents generated by a computer and camera that are not directly linked to DHS databases. *Id.*

165. *Id.* at 12 ("Secondary verifications lengthen the time needed to complete the employment verification process and could harm employees because employers might reduce those employees' pay or restrict training or work assignments, which are prohibited under pilot program requirements, while waiting for verification of their work eligibility.").

166. *Id.* at 12–13 (discussing the urgent need for more staff should the program become mandatory).

> According to USCIS officials, due to the growth in other USCIS verification programs, current USCIS staff may not be able to complete timely secondary verifications if the number of employers using the program significantly increased. In particular, these officials said that if a significant number of new employers registered for the program or if the program were mandatory for all employers, additional staff would be needed to maintain timely secondary verifications. USCIS has approximately 38 Immigration Status Verifiers allocated for completing Basic Pilot Program secondary verifications, and these verifiers reported that they are able to complete the majority of manual verification checks within their target time frame of 24 hours. However, USCIS officials said that the agency has serious concerns about its ability to complete timely verifications if the number of Basic Pilot Program users greatly increased. *Id.*

4. Analysis of No-Match Rule

The new DHS "No-Match Rule" is problematic because it unlawfully expands the limited definition of constructive knowledge in a way that is contrary to the court's finding of legislative intent in *Collins*.[167] This is particularly unfair because the Social Security database, which ICE hopes to use to gain leads to undocumented workers, is extremely error prone with most discrepancies coming from changed names, or incorrectly entered information.[168] The DHS regulation overburdens employers by forcing them to spend valuable time enforcing immigration law, by policing their employees to correct their information, or to spend time re-verifying their own records.[169] This will be particularly damaging to large entities that historically hire vast numbers of migrant workers, or other low-income workers.[170] At the same time it will be damaging to small businesses who have little time and resources to develop the expertise necessary to meet these requirements.[171]

The Small Business Association (SBA) wrote a letter to DHS Secretary Michael Chertoff addressing these concerns.[172] In the letter, the SBA alleges that the new law will have a substantial effect on a large number of small entities and suggests that the DHS did not take this into account prior to implementation.[173]

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167. Rebecca Riddick, *Nervous Employers Re-Examine Practices in Wake of Immigration Raids,* DAILY BUS. REV., Sept. 15, 2006, *available at* http://www.law.com/jsp/article.jsp?id=1158224722634 ("The proposed rules would allow ICE officials to use no-match letters as proof that employers 'knowingly' employed illegal immigrants.").

168. *Id.* ("The Social Security Administration database is 'notoriously error-prone and will undoubtedly result in wrongful terminations.'").

169. *Id.* ("It will 'require a lot of the (employer's) time to hold the hand of the employees in question.'").

170. *See, e.g., id.* (stating that if ICE were to increase enforcement efforts based on no-match letters, the "problem could be major in South Florida because of its large population of immigrant workers").

171. Letter from Thomas M. Sullivan, Chief Counsel, Office of Advocacy, to Michael Chertoff, Sec'y, Dep't of Homeland Sec. 1 (Sept. 18, 2007), http://www.sba.gov/advo/laws/comments/dhs07_0918.pdf (noting that small business representatives have indicated that no-matter letter rules "would impose substantive and costly legal obligations on employers").

172. *Id.* (discussing the harm the new law will cause to small businesses). Thomas Sullivan refers to the fact that the "no-match" letter rule is the subject of litigation in a federal court in California. *Id.*

173. *Id.* at 3 (discussing the role of DHS in calculating the effects of the new law). "Specifically, the rule requires employers to take certain actions in response to receiving 'no match' letters that they were previously not required to take. Those requirements represent costs that should have been quantified by the agency." *Id.* Sullivan explained that a proper RFA analysis was crucial because of the possible cost and impact of the rule on small businesses. *Id.* "Accordingly, Advocacy recommends that DHS stay the final rule

The law forces employers to police immigration laws against their own best interest. Choices for employers under this new regulation are all unappealing. Employers either face potential civil or criminal sanctions for violation of immigration laws, or engage in discriminatory practices to prevent civil or criminal sanctions.[174] Even if the laws were perfectly and fairly enforced, they would still have a ruinous effect on employers facing a looming labor shortage.[175]

5. Legal Challenges to the No-Match Rule

In an effort to protect both employers and employees from this regulation, several United States labor unions filed a lawsuit in 2007 asking for an injunction to prevent the implementation of this law.[176] In the suit, plaintiffs state that this rule unlawfully requisitions the Social Security database for use in immigration purposes,[177] and amends the definition of "knowing" under the statute.[178] Plaintiffs showed that never before had DHS or INS inferred an employer's constructive knowledge from the re-

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pending completion of a proper RFA analysis." *Id.* Sullivan also suggested that DHS determine whether there is a factual basis for the rule as well as feasible alternatives. *Id.*

174. *See* Charla Truett, *Verifying Employment Authorization While Avoiding Discrimination*, TEX. LAW., Mar. 25, 2005, *available at* http://www.law.com/jsp/tx/PubArticleTX.jsp?id=900005425940 (discussing no-match letter policy prior to new rule). In 2002, SSA started sending out no-match letters to all employers who had at least one record that did not match. This resulted in a lot of employer confusion and many employees were terminated as a result. *Id.* Previously, the no-match letter contained language notifying the employer that the letter itself was not an indication of the employee's lack of verification. *Id.* However, the letter was sufficient to require an employer to take further action to assure the mismatch was clerical or otherwise in error, lest it be used to prove evidence of constructive knowledge in a later action where the employee was deemed ineligible for employment. *Id.* The new law changes this standard by automatically putting the employer on constructive notice that an employee has problems with his or her authorization. *Id.*

175. Julie Myers, *If You Hire Illegal Immigrants, Expect Criminal Charges, Seizure of Assets*, ST. PAUL PIONEER PRESS, July 11, 2006, at 8D.

176. *See* First Amended Complaint for Declaratory and Injunctive Relief at 1, Am. Fed. of Labor v. Chertoff, 552 F. Supp. 2d 999 (N.D. Cal. 2007) (No. 07-4472 CRB), 2007 WL 5136848 (petitioning the court to issue a preliminary injunction and a temporary restraining order from acting on 72 Fed. Reg. 45,611 (Aug. 15, 2007)).

177. *Id.* ("This action challenges a new Department of Homeland Security ('DHS') rule that would commandeer the Social Security tax system for immigration-enforcement purposes.").

178. *Id.* at 9 (stating that the amended definition will require an assumption that an employee for whom a no-match letter was received is an "unauthorized alien"). A no-match letter, as defined by this amendment, is a letter sent out by the Social Security Administration which informs an employer that the Social Security number and the name of the employee do not match. *Id.* at 6.

ceipt of a no-match letter.[179] The suit further alleged that because the Social Security database is so error-prone, this would jeopardize the jobs of U.S. citizens, legal residents, and others with proper work authorization.[180] "[F]our percent of all Forms W-2 submitted by employers report earnings that cannot be matched with SSA records and that are therefore placed in SSA's Earnings Suspense File."[181] The suit contended that discrepancies in the Social Security database are not reliable indicators of an employee's work eligibility.[182] In addition, plaintiffs argued that in enacting this regulation, DHS has exceeded the authority granted to it by Con-

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179. *Id.* at 8 ("Until now, neither DHS nor its predecessor immigration-enforcement agencies had taken the position that an employer's failure to inquire into the work-authorization status of an employee subject to an SSA no-match letter meant that the employer had knowledge that it was employing an unauthorized worker."). Before this law, the INS had recognized that the discrepancies between name and SSN could occur for "many innocent reasons" that would not "put the employer on notice that the employee is unauthorized to work." *Id.* at 8.

180. *Id.* at 1 ("The new rule would place in jeopardy the jobs of U.S. citizens and noncitizens legally authorized to work simply because of discrepancies in the government's error-prone Social Security earnings database.").

181. First Amended Complaint for Declaratory and Injunctive Relief at 3, *Chertoff*, 552 F. Supp. 2d 999 (No. 07-4472 CRB) (illustrating the percentage of SS earnings that are unmatchable). The Earnings Suspense file is where all collected Social Security funds go when they cannot be matched to a Social Security number. *See* Martin H. Bosworth, *The Earnings Suspense File: Social Security's "Secret Stash," "Money from Nowhere" Fattens Government Accounts*, CONSUMERAFFAIRS.COM, Feb. 22, 2006, http://www.consumeraffairs.com/news04/2006/02/ss_secret_stash.html (stating that the Earnings Suspense File is where all collected Social Security funds go when they cannot be matched to a Social Security number). As of 2004, the file contained around 250 million records of names and Social Security numbers that could not be matched. *Id.* The intent of the file was to hold the funds until they could be matched with the rightful owner, but unless someone comes forward to claim them, it is nearly impossible to sort out. *Id.* Since IRCA passed in 1986, the file has increased exponentially due to multiple uses of the same SSN or people using fake SSNs. *Id.*

182. *See* First Amended Complaint for Declaratory and Injunctive Relief at 6, Am. Fed. of Labor v. Chertoff, 552 F. Supp. 2d 999 (N.D. Cal. 2007) (No. 07-4472 CRB), 2007 WL 5136848 (listing many reasons the records might be incorrect, including clerical errors on the government side or the employer side, re-issuance of SSN's of deceased people, name changes as a result of marriage or divorce, employees assimilating by using a less foreign sounding name, or different name configurations, a common practice in Latin American and Asian cultures). Plaintiffs also take issue with the 90 day time limit employers and employees have to resolve these discrepancies:

> The DHS "Safe Harbor" thus provides employees only 60 days to resolve the discrepancy with SSA because the DHS rule gives the employer 30 days to check its own records, and only after this initial step is complete need it advise the employee of the no-match. If employees insist their names and SSNs on their identification documents are correct but have not resolved the discrepancy with SSA by the deadline, or cannot produce the required additional photo identification, the employer would have to fire them. *Id.* at 10.

gress.[183] Plaintiffs pointed out that SSA no-match letters were previously merely advisory and stated specifically that they were not an indication that an employee was unauthorized to work.[184]

Plaintiffs feared that the new DHS rule will have damaging consequences to both employers and employees.[185] Plaintiffs contended that the law would pose significant administrative costs, put employers in danger of new criminal standards, automatically stigmatize employees for whom no-match letters are received, and result in discrimination and job loss for employees who appear foreign–even when they are legally authorized to work.[186]

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183. *Id.* at 1 ("Congress carefully balanced many policies in adopting and amending the nation's immigration laws and tax laws. Whether to now begin using SSA's confidential earnings database for immigration-enforcement purposes is a decision only Congress can make."). "SSA is not an immigration agency and does not know whether a particular SSN listed in a no-match letter relates to unauthorized work. SSA also is prohibited by tax privacy statutes from sharing the information in the Earnings Suspense File with DHS." *Id.* at 7.

184. *Id.* at 7 (pointing out that SSA does not have the authority to sanction employers that do not respond to SSA no-match letters). Furthermore, employers are considered to have complied in good faith if they transmitted the name and number given to them by the employee. *Id.*

185. *See generally id.* at 11–13 (discussing the problems the new rule will cause). These include imposition of "new obligations in violation of the law on every employer governed by the [Internal Revenue Code]" and "substantial administrative costs on at least 140,000 employers," firing of workers with no-matches "because of the worker's 'foreign' appearance or accent," relation to members of the plaintiffs' unions, the expenditure of "time and effort to resolve SSA data discrepancies" including time off from work, and termination from jobs because of failure to comply with SSA's ninety day deadline. *Id.* at 11–12.

186. *Id.* at 11–13 (listing all the negative effects of the new rule). Plaintiffs described serveral considerations:

> Plaintiff AFL-CIO [had] already devoted resources to commenting on the proposed rule to draw attention to the adverse impact of the rule on members of its affiliate unions. Plaintiffs have also devoted resources, and – if the regulation goes into effect – will have to continue to devote resources to answering inquiries from workers who are the subject of no-match letters about their rights in light of the new regulation and also from their affiliate unions about the impact of the new DHS rule on the affiliate unions' collective bargaining agreements, to developing and disseminating public education materials about the new regulations, and to conducting training and other outreach about the new regulation. If the regulation goes into effect, Plaintiffs [would] also have to devote resources to combating the ill effects of the DHS rule by, for example, advocating on behalf of workers who are unjustly terminated by their employers because of the new regulation. Plaintiffs have limited institutional resources and if they did not have to expend resources responding to the DHS rule, they could and would instead allocate these resources to other critical activities in furtherance of their mission of advocating on behalf of workers. *Id.* at 12–13.

In response to this lawsuit a federal judge granted plaintiffs' request for an injunction.[187] In the order, the judge held that injunction was proper because the plaintiffs raised serious issues the court needed to address to protect workers and employers.[188] The court cited significant burdens to both employers and employees.[189] More than 140,000 employers are slated to receive no-match letters; therefore, a significant number of employers will be forced to deal with the expense of the rule by adopting costly human resources procedures to assure compliance.[190] In addition, the court found that the new rule will cause harm to numerous employees as well because certain employees will face job losses if they are unable to correct discrepancies in the SSA database, regardless of whether they are actually authorized to work.[191] The court also reasoned that the new rule was arbitrary and capricious because it significantly changes prior regulation without reasoned analysis:

> Under the prior regime, receipt of a no-match letter was not, by itself, sufficient to trigger IRCA's liability under § 1324a(a)(2). DHS's

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187. Julia Preston, *Judge Blocks Bush Measure on Illegal Workers*, N.Y. TIMES, Oct. 11, 2007, *available at* http://www.nytimes.com/2007/10/11/washington/11cnd-nomatch.html?ex=1349755200&en=8908fb4d413ac07b&ei=5088&partner=rssnyt&emc=rss (showing the new rule was the central measure adopted by the Bush administration to curb illegal immigration). Interestingly, the judge that struck down the rule is the brother of Supreme Court Justice Stephen Breyer. *Id.*

188. *Chertoff*, 552 F. Supp. 2d at 1013 (order granting preliminary injunction) (stating that plaintiffs raised significant issues regarding whether the new rule is arbitrary and capricious, has exceeded DHS authority, and is in violation of the Regulatory Flexibility Act).

189. *Id.* at 1006–07 (order granting preliminary injunction) (acknowledging the "'significant' expense for employers to comply with the rule's timeframe and the 'likelihood that employers may simply fire employees who are unable to resolve the discrepancy within 90 days, even if the employees are actually authorized to work'").

190. *Id.* at 1005–06 (order granting preliminary injunction) (explaining that the new ninety day time frame for compliance will require employers to develop new systems for checking and rechecking employees at great expense to the employer). The court ruled against the plaintiffs regarding the issue of whether the new rule expands the definition of "knowing" under the statute. *Id* at 1008. "But this court cannot agree with plaintiffs' fundamental premise that a no-match letter can never trigger constructive knowledge, regardless of the circumstances. Accordingly, there is no serious question whether DHS's rule improperly alters the meaning of 'knowing' as used in § 1324a." *Id.* In reaching this conclusion, the court cited both *Mester Mfg. Co. v. INS* and *New El Rey Sausage Co. v. INS*; however, the court ignored the holding in *Collins Food*, which stated that legislative intent is to limit constructive knowledge. *Contra Collins Foods*, 948 F.2d at 549 (refusing to apply an expansive definition of constructive knowledge).

191. *Chertoff*, 552 F. Supp. 2d at 1000 (order granting preliminary injunction) ("[T]here is a strong likelihood that employers may simply fire employees who are unable to resolve the discrepancy within 90 days, even if the employees are actually authorized to work.").

> new position is that an employer who receives a no-match letter can, without any other evidence of illegality, be held liable under the continuing employment provision. Needless to say, this change in position will have massive ramifications for how employers treat the receipt of no-match letters. DHS may well have the authority to change its position, but because DHS did so without a reasoned analyses, there is at least a serious question whether the agency has "casually ignored" prior precedent in violation of the APA.[192]

Finally, the court reasoned that the authority to enforce the anti-discrimination provisions of § 1324(b) belongs to the Department of Justice (DOJ), and because of this, the rule has exceeded DHS authority where the rule states that employers who follow the safe-harbor procedures are protected from claims of discrimination.[193]

In response to this holding, DHS issued a supplemental rule in March of 2008.[194] However, the new rule contained no substantive changes.[195] By republishing the rule, DHS did not intend to address the concerns that led to the injunction preventing the rule's implementation, but simply intended to ask the court to dissolve it so DHS can proceed with implementation as soon as possible.[196] The public response to this rule from rights-based advocacy groups to labor organizations was overwhelmingly negative. The National Roofing Association cited concerns with errors in the Social Security database, negative impacts on the economy, and dispro-

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192. *Id.* at 1009 (order granting preliminary injunction) (stating the reason in which the new rule was found arbitrary and capricious).

193. *Id.* at 1011 (order granting preliminary injunction) ("There is therefore a serious question whether DHS has impermissibly exceeded its authority–and encroached on the authority of the Special Counsel–by interpreting IRCA's anti-discrimination provisions to preclude enforcement where employers follow the safe-harbor framework.").

194. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis, 73 Fed. Reg. 15,944 (Mar. 26, 2008) (to be codified at 8 C.F.R. pt. 274a) ("This supplemental proposed rule clarifies certain aspects of the August 2007 Final Rule and responds to the three findings underlying the district court's injunction.").

195. *Id.* at 15,955.

> Accordingly, for the reasons stated in the preamble to the proposed rule at 71 FR 34281 (June 14, 2006) and the preamble to the final rule at 72 FR 45611 (Aug. 15, 2007), and as further explained in the preamble to this supplemental proposed rule, the Department of Homeland Security proposes to repromulgate, without change, the regulations published at 72 FR 45611, as 8 C.F.R. 274a.1(l). *Id.*

196. Allen Erenbaum, *United States: DHS "No-Match" Rule Puts Employers in "No-Win" Situation,* MONDAQ BUS. BRIEFING, Apr. 9, 2008, *available at* http://www.mondaq.com/article.asp?articleid=59376 ("DHS intends to finalize the rule within several months and then ask the federal court to dissolve the injunction that is currently preventing the rule from taking effect.").

portionate burdens shouldered by small businesses, among others.[197] The American Civil Liberties Union points out that the rule violates due process rights because it does not contain a mechanism to allow employees to quickly correct incorrect information in the Social Security database that led to a finding against them.[198] These are just a few examples of groups who oppose this rule. The bottom line is that the concerns of the court have not been addressed and all the serious problems with the No-Match rule remain at issue.

The court's ruling is a step in the right direction. DHS's attempt to increase enforcement of the laws was flawed and overstepped its authority. The Social Security no-match rule is an example of an attempt by the administration to strengthen the "laws on the books" and it highlights why the problem is not a matter of enforcement, the problem is that "the laws on the books" are unworkable laws. They punish employers for the sins of their employees and put the burden of law enforcement on employers against their own best interests. Enforcement of employer sanction laws steadily declined since IRCA's passage in 1986 and eventually became non-existent. The reason is employers need workers and the documented United States labor force is not able to provide enough laborers to meet these demands. Good immigration policy would center around legalizing a workforce willing to meet the labor demands of United States employers, not on criminalizing and over-burdening employers with law enforcement duties.

B. *Workplace Raids: Enforcing the "Laws on the Books"*

In further efforts to increase enforcement against employers who hire undocumented workers, ICE has drastically increased its reliance on workplace raids.[199] Arrests at jobsites have increased from 500 in 2002 to

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197. Letter from Duane L. Musser, Senior Dir., Fed. Affairs, Nat'l Roofing Contractors Ass'n, to Dir. Regulatory Mgmt. Div. U.S. Citizenship and Immigration Servs. (Apr. 25, 2008), *available at* http://www.nrca.net/rp/government/update/0408_immigration.aspx ("However, NRCA firmly believes that the proposed supplemental rule is fundamentally flawed and is deeply concerned about the adverse impact that implementation of the rule will likely have on both employers and employees in the roofing industry.").

198. Letter from Caroline Frederickson, Dir. of ACLU Wash. Leg. Office et al. to Marissa Hernandez, U.S. Immigration and Customs Enforcement (Apr. 24, 2008), http://www.aclu.org/pdfs/immigrants/nomatch_comments_20080424.pdf ("The Proposed Rule Does Not Provide Due Process for Work-Eligible Workers Who Suffer Adverse Employment Consequences Caused by Government Data Errors.").

199. RANDY CAPPS ET. AL., THE URBAN INSTITUTE, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 1 (2007), http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf (noting the marked increase in the pace of workplace raids conducted by ICE in the past few years to apprehend undocumented immigrants).

3600 in 2006.[200] ICE has targeted employers across the country and their antics are resulting in lawsuits, fear for employers, terror and discrimination to employees, and significant burdens to entire communities. While it is important to enforce the laws, it is equally important that the laws be fair and be enforced in a manner that does not shock the conscious of reasonable people. These raids are conducted in such a way that they frighten workers, both documented and undocumented; separate parents from their children without warning or adequate time to prepare for alternate care; burden communities; result in and encourage racial profiling; and exhaust detention facility space and resources.

The legal authority to conduct workplace raids establishes clear boundaries regarding what ICE can and cannot do regarding investigations and inspections. The primary complaint against ICE (and formerly the INS) involves violations of the Fourth Amendment.[201]

1. Investigations

ICE officers have authority to initiate investigations on their own or they can base investigations on reasonable complaints received from third parties.[202] In *United States v. Brignoni-Ponce*, the Court addressed the standard that must be met for an INS officer to initiate an investigation on a vehicle believed to contain undocumented citizens.[203] This standard is equally relevant regarding whether an ICE officer may conduct an in-

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200. *Id.* (citing the statistics on arrests resulting from the raids).

201. *See* Press Release, United Food and Commercial Workers Union, Workers Decry Abusive ICE Misconduct (Aug. 16, 2007), http://www.hispanicprwire.com/news.php?l=in&cha=14&id=9246; *see also* U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. *Id.*

202. 8 C.F.R. 274a.9(b) (2008).

> Investigation. The Service may conduct investigations for violations on its own initiative and without having received a written complaint. When the Service receives a complaint from a third party, it shall investigate only those complaints that have a reasonable probability of validity. If it is determined after investigation that the person or entity has violated section 274A of the Act, the Service may issue and serve a Notice of Intent to Fine or a Warning Notice upon the alleged violator. Service officers shall have reasonable access to examine any relevant evidence of any person or entity being investigated. *Id.*

203. United States v. Brignoni-Ponce, 422 U.S. 873, 886 (1975) (holding that the apparent Mexican ancestry of vehicle occupants, by itself, was not enough to establish reasonable grounds to suspect the occupants were aliens).

vestigation on a business.[204] The government was seeking nearly unlimited discretion to stop and search people in efforts to enforce immigration laws.[205] The Court disagreed with the government and said there must be something more than the subjective impressions of the particular officer.[206] The Court stated that officers must be "aware of specific and articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."[207] This means that an ICE agent can initiate an investigation of a place of business when the agent has facts that reasonably lead her to believe that the place is employing undocumented workers.[208]

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204. *See id.* at 876 (stating that under the Fourth Amendment, as interpreted in *Almeida-Sanchez*, an officer must have a "founded suspicion" that the occupants of the vehicle are illegal aliens for purposes of stopping a vehicle and questioning its occupants).

205. *Id.* at 882 (discussing the tactics of two officers parked near a closed checkpoint station, who were pulling cars over based solely on the Hispanic ancestry of the vehicle's passengers). "To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants would subject the residents . . . to potentially unlimited interference with their use of the highway . . . ." *Id.*

206. *Id.* ("[T]he reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government.").

207. *Id.* (explaining the reasonableness standard for conducting investigations of vehicles that might contain undocumented citizens). The Court goes on to list several factors that might be considered when making a rational inference. *Id.* These factors include proximity to the border, information about recent border crossings, the appearance of the vehicle, whether the vehicle looks heavily loaded or clearly has an abnormal number of passengers, whether passengers appear as though they are attempting to hide, and mode of dress and haircut of passengers. *Id.* at 884–85; *see* Nicacio v. INS, 797 F.2d 700, 705 (1985) (stating that the articulable facts standard is a reasonable, objective person standard, not the subjective impressions of the officer).

> [Rational inferences] must, however, flow from objective facts and be capable of rational explanation. While an officer may evaluate the facts supporting reasonable suspicion in light of experience, experience may not be used to give the officers unbridled discretion in making a stop. . . . [D]etaining officers must have a particularized and *objective* basis for suspecting the particular person stopped to be an illegal alien. *Id.*

But see Matter of King and Yang, 16 I. & N. Dec. 502, 504-05 (B.I.A. 1978) (finding that ancestry can be a factor taken into consideration when it supports other facts). This case asserted that "[O]riental appearance, combined with the past history of illegal alien employment at that particular restaurant, and the anonymous tip, clearly would give rise to a reasonable suspicion of alienage sufficient to justify the very limited invasion of privacy . . . ." *Id.*

208. *See generally Brignoni-Ponce*, 422 U.S. at 882.

2. Warrants

ICE does not have the power to raid any commercial premise and demand to speak with employees, as it must have a warrant.[209] While the agency has a right to conduct its inspections, the business owner equally has a right that the search be confined as to scope, relevance and specificity.[210] These parameters are defined in a subpoena and detailed in a warrant, thus providing the employer with adequate information and due process to facilitate lawful inspection.[211]

In *Camara v. Municipal Court*, the Court addressed the issue of an area inspection.[212] This is particularly relevant to the workplace raid issue because in *Camara*, the Court determined that for an agency area inspection, like an ICE workplace raid, the standard of probable cause necessary to obtain a warrant is lower than what is necessary to obtain other warrants.[213] The Court said that in some cases, an agency's justifi-

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209. United States v. Widow Brown's Inn, 3 OCAHO 399, 1992 WL 535540, at *21–39 (Jan. 15, 1992), http://www.usdoj.gov/eoir/OcahoMain/publisheddecisions/Hardbound/Volume3/399.pdf (holding by the court that a warrant is required for INS investigations of commercial businesses). The administrative law judge (ALJ) concluded that "OCAHO and other jurisprudence confirms the [ALJ]'s discretion to hold the exclusionary rule applicable to administrative searches." *Id.* at 27. The ALJ found that, whether the exclusionary rule (i.e., barring evidence discovered without a warrant) should apply on a particular case would consist of a fact-based evaluation based on Fourth Amendment analysis and common law. *Id.*

210. *See* See v. City of Seattle, 387 U.S. 541, 544 (1967) (balancing the interests of the regulatory agencies with business owners). The Supreme Court found "strong support" for its conclusion that "warrants are necessary and a tolerable limitation on the right to enter upon and inspect commercial premises." *Id.* However, the Court went on to say "[i]t is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *Id.*

211. *See id.* at 544–45 (discussing the mutual benefits of obtaining a subpoena and warrant). The agency must limit its search to the confines of the formal subpoena, which may be subject to judicial review if the subpoenaed party questions its reasonableness. *Id.* The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. *Id.*

212. Camara v. Mun. Court, 387 U.S. 523, 536 (1967) (tracing the focus of the debate concerning probable cause and how it pertains to area inspections). The economic effect poor building quality has on urban areas combined with a heightened threat of fires and disease has lead local governments to uphold municipal police power to conduct inspections in order to ensure compliance with accepted minimum standards. *Id.* at 535. "In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." *Id.*

213. *See id.* at 535–36 (distinguishing the scope of investigation needed in a criminal matter, which only affects a limited number of individuals, from the investigative scope

cation for inspection can be based on the characteristics of the area as a whole, and in many cases, inspection on a broad scale is required to adequately enforce the laws.[214] Thus, in *Camara*, the Court lessened the probable cause standard when an agency plan reasonably required greater officer discretion.[215] This is applicable in workplace raid situations where an ICE officer has general knowledge of undocumented worker populations in a particular geographic area, or with a particular business or business industry. This standard makes it easy for ICE to

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needed to assure broad compliance with certain regulations). "Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. *Id.* at 535.

214. *See id.* (stating that "the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building"). There was unanimous agreement by the Court that periodic building inspections are the only effective way to guarantee universal compliance with municipal building codes and regulations. *Id.* at 535. The Court further reasoned that "[t]he primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety." *Id.*

215. *See id.* at 534–36 (analyzing the reasonableness standard and how it relates to probable cause). The Court concludes that in conducting area inspections to enforce municipal building laws, an inspector does not have to have probable cause to believe that a particular building may be violating minimum standard laws. *Id.* at 534. Although the Court states that it is unable to determine a set test to determine reasonableness, it lays out three characteristics that should be shared by an agency plan seeking the lesser standard to obtain a warrant. *Id.* at 537. First, the programs should have significant history of acceptance by the public and the court. *Id.* Second, the matter is of high public interest, and there is no other reasonable way to resolve the issue. *Id.* Finally, the privacy invasion is limited because it is not personal, and not aimed at discovering a crime. *Id.* Although these are mere guidelines, the final point is troubling from the standpoint of the employer or the employee. Immigration workplace raids are conducted under civil laws; currently, employers face mostly civil fines and sanctions, however, some employers face criminal sanctions for violating immigration laws and some employees face criminal identity theft and document fraud charges. In addition, if DHS gets what it wants, criminal charges against employers who hire undocumented workers will be the norm. In light of these problems, the standard for immigration warrants and raids should be raised to probable cause standards. Subsequent cases have recognized the vague position left by *Camara* and suggest a reliance on congressional intent to determine whether the purpose of what is being enforced is supposed to have a strong inspection component, and to balance that intent against the level of invasion onto the inspected. *See* McLaughlin v. A.B. Chance Co., 842 F.2d 724, 727 (4th Cir. 1988) (asserting that "[i]n balancing the need to search against the invasion which the search entails it is obvious that Congress intended a strong inspection enforcement scheme to fulfill the purposes of the Act"); *see also* Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1218 (D.C. Cir. 1981) ("Congress, in passing the Immigration and Nationality Act, contemplated a vigorous enforcement program that might include INS entries onto private premises for the purpose of questioning 'any alien or person believed to be an alien,' and of detaining those aliens believed to be in this country illegally.").

come up with the criteria necessary to establish enough evidence to search virtually any workplace. As ICE increases its enforcement practices, reliance on this reduced specificity exception will increase.

3. Basis for Factory and Worksite Raids

Immigration and Naturalization Service v. Delgado deals with a factory survey, or workplace raid, where the Court ruled INS actions did not constitute an unlawful seizure of the entire workplace under the Fourth Amendment.[216] In determining whether or not a seizure under the Fourth Amendment occurred the Court looks to see if the raid was "so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave" if he refused to answer an INS officer's questions.[217] INS agents were stationed at the doors of the facility giving many workers the impression that they were not free to leave.[218] The Court says this also did not constitute an unlawful seizure or detention because the people were free to move about the workplace:

> We reject the claim that the entire workforces of the two factories were seized for the duration of the surveys when the INS placed agents near the exits of the factory sites. Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the worker's voluntary obligations to their employers . . . . While the surveys did cause some disruption, including the efforts of some workers to hide, the record also indicates that workers were not prevented by the agents from moving about the factories.[219]

The Court reasoned the presence of the agents at the doors was intended to ensure that all workers were questioned, not to ensure that no employees left the premises.[220] The agents' presence was not enough to

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216. *See* INS v. Delgado, 466 U.S. 210, 212 (1984) (disagreeing with the lower court that held a search of this kind did amount to unlawful seizure of the entire workplace in violation of the workers' Fourth Amendment rights). "The questioning of each respondent by INS agents seems to have been nothing more than a brief encounter." *Id.* at 219.

217. *Id.* at 216 ("Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment.").

218. *Id.* at 217 (noting that INS agents were stationed at the exits of the factory buildings).

219. *Id.* at 218 (discussing the actions of INS agents and how this was not intrusive to Fourth Amendment rights).

220. *Id.*

> Respondents argue, however, that the stationing of agents near the factory doors showed the INS's intent to prevent people from leaving. But there is nothing in the

make workers believe agents would detain them if they gave honest answers or refused to speak.[221] In addition, the possibility of being questioned if the employee tried to leave was not enough to make an employee believe he would be detained or was being detained.[222]

4. Questioning Suspected Undocumented Citizens

ICE officers have the right to question people they believe to be undocumented immigrants and to arrest and detain these people if they believe they are in the country illegally.[223] ICE raids and investigations are conducted under civil, not criminal law; therefore, protections such as Miranda rights are not provided to undocumented citizens when they are arrested, questioned or detained.[224] Because immigrants are not read

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record indicating that this is what the agents at the doors actually did. The obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned. *Id.*

221. *See Delgado*, 466 U.S. at 218 (stating that the INS did not give the workers any reason to believe that they would be detained if they gave honest answers or refused to speak).

The record indicates that the INS agents' conduct in this case consisted simply of questioning employees and arresting those they had probable cause to believe were unlawfully present in the factory. This conduct should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer. If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits. *Id.*

222. *See id.* at 219 ("Likewise, the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way.").

223. 8 U.S.C.A. § 1357 (a)(1)-(2) (West 2008).

(a) Powers without warrant

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States . . . . *Id.*

224. *E.g.*, Julie Preston, *No Need for a Warrant, You're an Immigrant*, N.Y. TIMES, Oct. 14, 2007, *available at* http://www.nytimes.com/2007/10/14/weekinreview/14preston.html?_r=1&pagewanted=print&oref=slogin. ("Since the raids were carried out under immigration law, many protections in place under the American criminal code did not apply . . . . There are no Miranda rights that agents must read when making arrests."). Federal

their rights, they often do not know they are entitled to retain a lawyer, and sometimes, they are quick to sign deportation papers or statements that are not in their interest.[225] This is one of the many inequities caused by ICE civil searches and lessened probable cause standards.

In *International Molders' v. Nelson*, the court determined whether factory surveys, or workplace raids are legal under the Fourth Amendment.[226] In this case, plaintiffs challenged the constitutionality of workplace raids and sought an injunction to prevent INS from moving forward with "Project Jobs," a national enforcement plan similar to that occurring presently under DHS to enforce immigration laws called "Operation Wagon Train."[227] The court looked at the standard of evidence that workplace investigations should be based upon.[228] The court ruled that requiring INS to provide specific names of suspects placed too high a burden on the INS.[229] This level of specificity is not required by the

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immigration agents in Long Island in a search for immigrant gang members raided two homes where both legal immigrants and American citizens were "rousted" from their beds and arrested without a warrant. *Id.*

225. RANDY CAPPS ET AL., THE URBAN INSTITUTE, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 24 (2007), http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf (illustrating immigration raids in which a large number of arrested immigrants signed papers agreeing to be deported without appeal). The raids were conducted as part of "Operation Wagon Train," in which 1297 undocumented immigrant workers were arrested from six Swift & Company meatpacking plants in December of 2006. *Id.* at 21. "In many cases [the arrested workers] also agreed to leave the United States before they had any access to a lawyer or an official from their consulate." *Id.* at 24.

226. *See* Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 550 (9th Cir. 1986) (stating that plaintiffs instituted an action against defendants for "the manner in which the Immigration and Naturalization Service (INS) conducted searches and made arrests").

227. *See id.* ("[P]laintiffs challenge the constitutionality of 'factory surveys' occurring in northern California during the week of April 16, 1982, as part of 'Project Jobs,' a nationwide enforcement action against undocumented aliens."). Specifically, plaintiffs complained of the factory searches conducted, arrests made, and manner in which the INS practiced. *Id.; see also* RANDY CAPPS ET AL., THE URBAN INSTITUTE, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 21–23 (2007), http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf (discussing "Operation Wagon Train," one of the largest worksite enforcement actions ICE, or any other U.S. immigration authority, has ever conducted, resulting in the arrests of 1297 undocumented workers at meat packing plants around the country).

228. *See* Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 553 (9th Cir. 1986) (recognizing the difficulty in this process where little information about undocumented aliens is available and finding counsel unable to propose a particularity standard).

229. *See id.* ("The requirement to 'identify the suspect(s) by name' or to provide 'enough specific identifying information to assure that the search for that person is reasonably likely to result in finding that person' imposes an unreasonable and impractical bur-

Fourth Amendment.[230] In addition, the court said that the INS did not need lists of people they intended to merely question.[231]

5. Detentions

A subsequent case looked at a situation where INS raided the home of migrant farm workers living at a company owned residence on the business property.[232] This case is analogous to workplace raids because it deals with the legality of temporarily detaining people in a group in order to sort through and discover undocumented people. The plaintiffs in *Gallegos v. Haggerty* claimed they were unlawfully detained because they were questioned and ordered to sit on the front yard of the house after the INS agents determined that they were United States citizens or otherwise lawfully permitted to be in the United States.[233] The court ruled that several factors should be taken into account to determine whether this sort of detention could be considered reasonable.[234] Those factors include, the length of, and the relative invasion on, the detainee's Fourth Amendment interest, the legal purpose accomplished by the stop, and whether the investigative tactics were as minimally invasive as possible to meet the purpose of the search.[235] The court refused to grant a motion for summary judgment on this issue because the stop exceeded ninety

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den on the INS."). Here, the court opined that even without identified names, narrowly tailored warrants and affidavits would satisfy Fourth Amendment requirements. *Id.*

230. *Id.* (stating that a less specific standard is acceptable and is the appropriate standard through which INS may conduct an investigation). "The specificity that paragraphs two and three of the injunction order demand for entry warrants is not required under the Fourth Amendment." *Id.*

231. *See id.* ("[N]on-detentive questioning is permitted based solely on a reasonable suspicion that the person is an alien."). However, absent probable cause, the requirements of the Fourth Amendment will not be satisfied. *Id.*

232. *See* Gallegos v. Haggerty, 689 F. Supp. 93, 96 (N.D.N.Y. 1988) (discussing the facts of the case). Plaintiffs in this case were either U.S. citizens or legal permanent residents with Mexican citizenship. *Id.* INS raided the home based on claims of three phone calls about suspected illegal aliens. *Id.* The agents entered the house through the front, back and cellar doors and stayed at the house for approximately ninety minutes. *Id.*

233. *Id.* at 100 ("Defendants move to dismiss claiming that the 'investigative stop' was (1) reasonable in duration and scope; and (2) based on a reasonable suspicion that plaintiffs were aliens illegally in the United States.").

234. *Id.* at 101 (discovering a formula for determining reasonableness). The court noted that while the Supreme Court, in United States v. Sharpe, 470 U.S. 675, 685 (1985), did not provide a strict time limitation on investigative stops, it has elaborated on different factors that courts should consider in making its decision. *Id.*

235. *Id.* (listing factors relevant to determine whether an investigation is a violation of Fourth Amendment rights). Those factors include the following:

> (1) the brevity of the invasion of the individual's Fourth Amendment interest; (2) the law enforcement purposes served by the stop; (3) the time reasonably needed to effectuate those purposes; and (4) whether the police diligently pursued means of investi-

minutes and because the Border Patrol agents failed to satisfy that this stop was otherwise reasonable according to the articulated factors.[236]

Gallegos also looked at the issue of what comprises reasonable suspicion to constitute a large inspection and detention intended to discover information about a person.[237] Defendants relied on *English v. Salva*[238] to support their position that impetus for the raid on the home was permitted. In *English* the court stated that particularized suspicion can be enough to justify an inspection even where INS did not have the names of the persons intended to be inspected or even detained.[239] The *English* court said reasonableness should be determined by reliance on two factors: first, that the detention was minimally intrusive and second, that the factors the agent relied on were not primarily based on race or ethnicity.[240] This is a frightening precedent because it gives ICE the authority to enter a workplace and question individuals based on any information ICE can represent amounts to articulable evidence that a particular place of business employs undocumented workers. Based on the *English* precedent, ICE has the authority to enter and detain the group as a whole, so it can question people to discover who is an undocumented worker and who is legally authorized to work. ICE does not need to be seeking specific individuals. This is an extremely dangerous precedent for businesses who hire large numbers of minority workers. ICE could feasibly cloak a suspicion that an employer hires undocumented workers on loose facts and unsubstantiated rumors and raid a workplace. This could tie up operations costing employers immeasurable economic loss while at the same time threatening the civil rights of legal workers. The *Gallegos* court seemed to agree that *English* interpreted the law too broadly stating,

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gation likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the suspect. *Id.*

236. *See id.* at 102 ("As plaintiffs correctly point out, the Supreme Court has never upheld an investigative stop lasting as long as ninety minutes, and in addition, defendants have not shown why some of the workers were detained as long as they were.").

237. *See Gallegos*, 689 F. Supp. at 102 ("A detention or seizure, no matter how brief, requires reasonable and objective grounds.").

238. English v. Sava, 571 F. Supp. 1029, 1039 (S.D.N.Y. 1983) (challenging the constitutionality of a search and seizure during an inspection of buses thought to transport undocumented individuals).

239. *Id.* (explaining how plaintiffs objected to an INS operation in which INS officers, based on a tip, boarded buses to conduct surveys of suspected illegal immigrants). The plaintiffs argued that without individualized suspicion, the INS actions were illegal. *Id.* The court disagreed and held that the particularized suspicion requirement is satisfied even if the INS doesn't have names or detailed physical description of suspected illegal aliens. *Id.*

240. *Id.* at 1040 ("In sum, the procedures followed here occasioned limited intrusion upon those subject to the detention, and also avoided mere reliance on ethnic or racial characteristics in selecting passengers for questioning.").

"[T]o the extent that *English* appears to permit a group detention based on suspicion of illegal aliens within the group, this court declines to follow it."[241] However, these two decisions represent a circuit split and ICE could rely on the broadest interpretation of *English* to justify targeting any employer who hires a large number of minority workers.

6. Criminal Standards for Criminal Violations

Employers and employees are subject to searches and detentions based on the lessened standards for civil warrants.[242] Because both employers and employees face potential criminal sanctions, the standards for searching and detaining employers as they stand strongly favor immigration agents at the expense of workers and employers.[243] This is unfair; since workers and employers face criminal sanctions, they should be subjected to criminal standards. Namely, the lessened standard of probable cause should be irrelevant when officers are seeking individuals for criminal violations such as identity theft and felony entry into the United States. When ICE goes into a place of business on evidence of those criminal violations, they should be seeking only those individuals they have suspicion of violating the actual criminal violations. In addition, detainees should be read their rights and provided an attorney when facing criminal violations.

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241. *See Gallegos*, 689 F. Supp. at 103 (clarifying that defendants interpret too broadly the meaning of the holding in *English* and refusing to follow an interpretation of *English* that could be read so broadly). In addition, this court distinguishes this case from *English* because the stop in this case was for an extended period of time, whereas in *English* the stop was merely ten minutes. *Id.*

242. *See* Note, *Reexamining the Constitutionality of INS Workplace Raids After the Immigration Reform and Control Act of 1986*, 100 HARV. L. REV. 1979, 1981 (1987) (distinguishing the requisite criminal standard of probable cause from the lesser standard required for issuing INS warrants in civil administrative searches) (citing Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1223 (D.C. Cir. 1981)).

243. *See id.* at 1980 (discussing how the change in the law changed employers' interest in the laws). "One result of this discrepancy was that employers had little at stake in INS workplace raids beyond the temporary disruption of production and the loss of a few workers who could readily be replaced. Consequently, most employers willingly consented to workplace raids." *Id.*

> [T]he fact that the Immigration Reform and Control Act grants the INS new statutory powers that enable it to function effectively suggests that courts in future raids cases should tend to their primary duty—protecting the constitutional rights of individuals. Indeed, in section 115 of the Act, Congress explicitly states that "the constitutional rights, personal safety and human dignity of United States citizens and aliens" should not be sacrificed in the course of enforcing the nation's immigration laws. *Id.* at 2000.

By requiring INS agents to establish probable cause to obtain a warrant, courts can effectively prevent constitutional violations from occurring and protect equal rights of workers and business owners. *Id.*

7. Legal Challenges to Recent Workplace Raids

DHS is facing legal challenges over workplace raids because the manner in which they are conducted is exceeding the authority granted by Congress and developed through case law.[244] The United Food and Commercial Workers International Union (UFCW) filed a suit on behalf of several of its United States citizen or legal permanent resident union members alleging several violations involving detentions and questioning methods used by ICE.[245] The suit claims that while ICE agents publicly stated they were entering the workplace because they had specific knowledge that workers were engaging in criminal acts of identity theft, they did not focus their investigation on the criminal activities; they instead used this as an excuse to enter and investigate civil immigration violations.[246] ICE should have based their entry into the plant under civil violations of immigration laws, but instead they entered seeking criminal violators. Therefore, the standard for warrants and detentions were different because ICE entered the workplace based on criminal charges. Because they did not enter based on civil violations, they should have

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244. *See* Nina Bernstein, *Challenge in Connecticut Over Immigrants' Arrest*, N.Y. TIMES, Sept. 26, 2007, *available at* http://www.nytimes.com/2007/09/26/nyregion/26daylabor.html?ref=nyregion ("Nine day laborers are expected to file a federal lawsuit today challenging the legality of a sting operation in Danbury, Conn., last year that that led to their arrest on immigration charges."); *see also* Original Complaint—Class Action Request for Injunctive and Declaratory Relief and Damages Jury Demand on Damage Claims at 12, United Food & Commercial Workers Int'l Union v. U.S. Dep't of Homeland Sec. (N.D. Tex. Sept. 11, 2007) (No. 2-07CV-188-J), 2007 WL 4825029, http://www.ufcw.org/docUploads/9-11-07SwiftRaidsComplaintFin.pdf?CFID=3912381&CFTOKEN=16828907 (outlining permissible actions that can be taken by ICE agents under 8 U.S.C. § 1357); *see also* Interview by Amy Goodman with Gloria Contreras-Edin, Executive Dir., Centro Legal (Sept. 28, 2007), *available at* http://www.democracynow.org/article.pl?sid=07/09/28/1353253&mode=thread&tid=25 (describing the lawsuit brought by a Minnesota immigrant rights group which alleges that Immigration and Customs Enforcement abused its authority when raiding a meatpacking plant). The agents "systematically and procedurally started rounding up people who were of Latino descent." *Id.*

245. Original Complaint—Class Action Request for Injunctive and Declaratory Relief and Damages Jury Demand on Damage Claims at 3–7, United Food & Commercial Workers Int'l Union v. U.S. Dep't of Homeland Sec. (N.D. Tex. Sept. 11, 2007) (No. 2-07CV-188-J), 2007 WL 4825029, http://www.ufcw.org/docUploads/9-11-07SwiftRaidsComplaintFin.pdf?CFID=3912381&CFTOKEN=16828907 (alleging violations such as detention without reasonable suspicion to believe persons were in violation of the Immigration and Nationality Act and denial of access to an attorney in a manner that was inconsistent with the Act and the U.S. Constitution).

246. *Id.* at 10 (stating that "defendants engaged in mass warrantless detentions of workers rather than focusing their enforcement activities on those workers regarding whom they allegedly had prior knowledge of illegal activity"). Defendants asserted that a lengthy investigation revealed "substantial evidence" that workers at raided facilities were guilty of identity theft. *Id.*

only targeted the people they had specific knowledge about. As such, detention of the entire workplace was not lawful under the aforementioned progeny of cases because it was not based on civil violations. As a result, the suit claims that the mass detentions are not in accordance with existing law and are in violation of 8 U.S.C. § 1357 and Fourth and Fifth Amendment rights.[247]

Another lawsuit was filed by immigrant rights group Centro Legal.[248] This suit also makes claims similar to the UFCW suit regarding discrepancies between civil and criminal searches.[249] In addition, this suit claims that the raids were conducted in a discriminatory manner because non-Latino workers were allowed to roam the worksite freely while Latino workers were detained and subjected to questioning.[250] These suits are evidence that the greatest fears surrounding the threats to minority workers are being realized as ICE increases workplace raid activity. Minority workers, especially Latino workers, are singled out and isolated while white workers are given preferential treatment.

8. Burdens of Workplace Raids

In addition to legal challenges, the raids have significant negative consequences for society. In Nevada, ICE agents raided several McDonald's restaurants and made multiple arrests.[251] Employers complained that

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247. *Id.* at 3–7. UFCW claims that ICE is violating the law because they are detaining people who are not likely to escape or otherwise resist arrest. *Id.* at 13. UFCW also claims that ICE agents did not have regard for minor children of arrestees that required care in violation of the due process guarantee of the Fifth Amendment. *Id.* at 14. Finally, UFCW asserts that it is ICE's custom to deny people access to lawyers and this is also a violation of the First and Fifth Amendments. *Id.* at 12–13.

248. Press Release, Centro Legal, Centro Legal Files Class Action Lawsuit Related to Home Raids by ICE in Minnesota (2008), *available at* http://www.centro-legal.org/index.php?option=com_content&task=view&id=108&Itemid=49.

249. Interview by Amy Goodman with Gloria Contreras-Edin, Executive Dir., CentroLegal (Sept. 28, 2007), *available at* http://www.democracynow.org/article.pl?sid=07/09/28/1353253&mode=thread&tid=25 (explaining that the initial reason for the raid on the meatpacking plant in Minnesota was part of a criminal investigation although the employees of the plant were not afforded such rights as "the right to remain silent" and "the right to counsel"). Over one hundred agents "descended upon the Swift Company" and loaded six buses with Latino employees regardless of whether they were citizens or residents, unless they could prove at the time of the raid that they were here lawfully. *Id.* Centro Legal is not only challenging how the agents conducted the raid as a criminal investigation, but they are also challenging the constitutionality of the removal proceedings. *Id.*

250. *Id.* (stating that the lawsuit specifically states that the Latino workers were "ordered to disrobe in front of federal agents during the raid" while other White workers were permitted "to move about the plant freely"). The lawsuit claims that the agents "insulted, abused, and humiliated the plaintiffs on account of their race." *Id.*

251. *See* Scott Sonner, *Over 40 Arrests in Nev. Immigration Raid,* ASSOCIATED PRESS, Sept. 14, 2007, *available at* http://www.sfchroniclemarketplace.com/cgi-bin/article.cgi?file=/

they did not know they were hiring illegal workers and were subjected to "Gestapo methods" of enforcement, which is what it appears like to workers when hundreds of armed ICE officers flood the building and lock down the facility, and begin questioning anyone who looks Latino.[252] An illustrative account of one particular ICE raid is as follows:

> [S]warms of armed federal agents from Immigration and Customs Enforcement, or ICE, gathered in the blistering cold outside the Michael Bianco, Inc. leather goods factory in New Bedford, Mass. At about 8 a.m., as a helicopter circled overhead and police kept watch in Coast Guard boats in the nearby harbor, the agents rushed the building military-style, blocked the exits, and ordered the employees to turn off their sewing machines, where most were busy stitching backpacks and vests for the U.S. military.[253]

Employers fear the raids not simply because they face potential sanctions, but because they fear significant financial losses that will result from the loss of their labor force. American growers' associations estimate that roughly seventy percent of seasonal farm workers are undocumented.[254] In New York alone there are more than three billion apples

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n/a/2007/09/28/national/a042721D17.DTL (stating that immigration agents made "at least" fifty-six arrests in Reno, Nevada after there was an identity theft complaint, which led the agents to believe that there were McDonald's employees in the country illegally). "Federal agents raided 11 McDonald's restaurants in northern Nevada and made dozens of arrests Thursday as part of an investigation into illegal immigration." *Id.*; *see also* Scott Sonner, *Some Arrested in Nevada Raids Deported*, BOSTON.COM, Sept. 28, 2007, http://www.boston.com/news/nation/articles/2007/09/28/over_40_arrests_in_nev_immigration_raid/?rss_id=boston.com+%2F+News.

252. Scott Sonner, *Over 40 Arrests in Nev. Immigration Raid,* ASSOCIATED PRESS, Sept. 14, 2007, *available at* http://www.sfchroniclemarketplace.com/cgi-bin/article.cgi?file=/n/a/2007/09/28/national/a042721D17.DTL (explaining that local leaders and employers in Nevada do not approve of the methods that ICE is using to find illegal immigrants). Employers interviewed about the raids responded that they do not willingly hire illegal aliens and are required to have documentation from their employees. *Id.*

253. Aimee Molloy, *Placating the GOP Base or Protecting the Workplace?*, SALON.COM, July, 27, 2007, http://www.salon.com/news/feature/2007/07/27/ice_raid/.

> By [the] evening [of March 6, 2007], 361 workers—mostly from Guatemala and El Salvador—had been taken into custody after they were unable to prove they had legal status to work in the United States[.] The factory owner and three managers were also arrested and charged in connection with hiring illegal aliens. *Id.*

254. Lisa W. Foderaro, *Immigration Crackdown Threatens Bumper U.S. Apple Harvest*, INT'L HERALD TRIB., Aug. 21, 2007, *available at* http://www.iht.com/articles/2007/08/21/america/immig.php ("Growers' associations across the country estimate that about [seventy] percent of farmworkers are illegal immigrants, many of them using fake Social Security numbers on their applications.").

that must be picked by hand annually.[255] There is simply no one else willing to take the six-week labor intensive job of picking the apples, other than undocumented workers.[256] The result of this labor shortage will be that apples will go to waste, as they remain on trees, resulting in lost profits and increased expenses to the American consumer.[257] There is no legal solution for employers to obtain the workers they need; as a result they are put in an impossible position, break the law and employ undocumented workers in a symbiotic relationship, or go out of business.

In a recent report, The Urban Institute, in collaboration with the National Council of La Raza, conducted a study of the effects of workplace raids on families and on the surrounding community.[258] Their findings prove that the actual effect on communities is so damaging that it far outweighs any potential benefit received from conducting the raid in the first place.[259] Public schools were burdened by responsibilities in caring for children whose parents had been detained both in assuring the childrens' safety and in dealing with normal educational duties.[260] The long-

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255. *Id.* ("We have three billion apples to pick this fall and every single one of them has to be picked by hand . . . .").

256. *Id.* ("It's a very labor-intensive industry, and there is no local labor supply that we can draw from, as much as we try. No one locally really wants to pick apples for six weeks in the fall.").

257. *Id.* (discussing the effect of the raids that targeted the agriculture sector in New York). "It was difficult. In a lot of cases, there were apples left hanging on the trees." *Id.*

258. RANDY CAPPS ET AL., THE URBAN INSTITUTE, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 1 (2007), http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf (summarizing the factual findings underlying the report's conclusions and recommendations). The findings of the report are based on a study of three American cities that experienced large-scale worksite immigration raids in 2006 and 2007: Greeley, Colorado; Grand Island, Nebraska; and New Bedford, Massachusetts. *Id.* at 2. In each city, researchers for The Urban Institute interviewed employers, lawyers, religious leaders, public social service agencies, nonprofit agencies, community leaders, and others to discuss the impact of the raids on the children of the arrested workers as well as on the communities involved. *Id.* Interviews with some of the arrested parents and other caregivers of the affected children were also conducted in conjunction with the study. *Id.*

259. *Id.* at 68 (finding that workplace raids have widespread damaging consequences for families and communities). The report concludes that even if all of its recommendations for alleviating the suffering of children affected by immigration raids were heeded during every raid, "it would only slightly alleviate the hardship and trauma experienced by immigrant families and their children." *Id.*

260. *Id.* at 38 ("School administrators and teachers in these two school districts said that they felt a heavy burden when dealing with instructional goals and normal daily routines while also managing a broad range of unanticipated issues that arose following the raids."). In Greeley and Grand Island, two of the cities in which massive-scale raids were conducted, most of the children affected were of school age and were in school at the time of the raids. *Id.* Consequently, the schools became primarily responsible for responding to the effects of the raids on the affected children. *Id.*

term effect of the raids usually means that at least one parent (normally a United States citizen) is taken out of the child's home. Often times, it is the primary wage earner that is displaced.[261] This means that the child's hardship will increase by becoming significantly financially disadvantaged, as well as losing the support of a two-parent home.[262] The stress and disturbances caused by the raids also inflicted psychological problems and created behavioral problems in the children affected.[263]

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261. *Id.* at 41.

> The relative strength of immigrant families protects children from the adverse consequences often associated with growing up with single parents. Worksite enforcement operations, by removing both a parent and a breadwinner from the home, have multiple consequences for children. First the removal of a breadwinner substantially lowers family income and thereby further increases families material hardship. Second, the loss of a parent creates a more unstable home environment and removes one of the main strengths in immigrant families—the presence of two parents. *Id.*

According to the study, the remaining parent often had tremendous difficulty coping with the economic and psychological stress resulting from the arrest of the breadwinning spouse. *Id.* at 42. The parent most often left behind was the mother, who was typically less integrated into U.S. society and less prepared to single-handedly deal with daily life and finances than her husband. *Id.* at 42.

262. *Id.* (addressing the fact that the separation and fragmentation of families affected by the workplace raids had the preeminent negative impact on children). In most of the cases studied, the impacted children were living in two-parent households prior to the raids, in which only one parent was arrested. *Id.* However, in Grand Island, 25 of 151 of the impacted children (about seventeen percent) endured the arrest of both parents. *Id.* There were also cases reported where single parents were arrested. *Id.* In New Bedford, about fifty percent of the arrested parents were released from custody at various times because they were either single parents or the primary caretakers of young children. *Id.*

263. RANDY CAPPS ET AL., THE URBAN INSTITUTE, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 50 (2007), http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf ("Although children can be resilient under difficult and unstable circumstances, the severe disruptions caused by the raids in the three study sites led to behavioral problems and psychological distress for some children."). The report noted that the separation of children from their parents caused extreme and pervasive emotional trauma, especially because the separation happened suddenly and unexpectedly, and the trauma of separation was greater the longer the separation lasted. *Id.* In addition, "community-wide fear and social isolation" heightened the psychological impact of the raids for the affected children. *Id.* However, researchers found that very few parents sought or received mental health care for themselves or their children, though psychologists interviewed for the study associated the children's anxiety with conditions ranging from separation anxiety to attachment disorder and post-traumatic stress disorder. *Id.* at 50–51. Many parents, unable to explain the loss of the other parent to their children, reported that, months after the raids, their children still cried in the mornings before being dropped off at school and obsessed over whether their parents would be able to pick them up from school at the end of the day. *Id.* at 50–51. Even children whose parents were not arrested in the raids developed similar fears and anxieties, and teachers noted that the children began to personalize the cause of the separation. *Id.* at 51.

In addition to the burdens on schools, families, and children, the workplace raids had lasting negative consequences for the members of a community as a whole, who had to pick up the pieces left by Operation Wagon Train.[264] Churches played a central role in the relief efforts as families flocked to them for assistance; however, the limited resources and infrastructure available to churches made it hard to sustain the efforts over the long term.[265] However, this became a problem because in giving out aid, the churches became involved in controversies for helping undocumented people and had to begin verification themselves. This ultimately diminished the trust people had in their churches, resulting in people being left utterly helpless.[266]

The burdens of workplace raids extend far into American society. They create significant problems for U.S. citizen children who are frequently left parentless with no warning. They unfairly burden communities, which have to respond rapidly and at great expense to the devastation left by these policies with no assistance from the government.

The practice of workplace raids should be abandoned. Instead of focusing on enforcement tactics that frighten and harm individuals, communities, and businesses, DHS should turn its attention toward workable solutions that meet employer and U.S. economic needs and interests.

IV. Effective Solutions for Fairly Controlling Illegal Immigration While Satisfying Labor Demands

DHS has tried many different methods in its efforts to curb illegal immigration. Their attempts to enforce the law by imposing a greater burden on the employer through no-match letters was unsuccessful and ill-

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264. *Id.* at 11 ("Community respondents from each site said that they approached the immediate aftermath of the raid as 'disaster relief,' even though few had experience providing emergency relief to hundreds of families simultaneously."). In all three cities studied, churches and other faith-based organizations were the primary responders to the crisis occasioned by the raids. *Id.* at 55. Community leaders mobilized quickly to meet the affected immigrants' short-term needs, especially housing, utilities, food, and clothing. *Id.*

265. *Id.* ("In the longer run, [churches] faced infrastructure and staff limitations that made it difficult to sustain the relief efforts."). Staff shortages impaired churches' ability to assist needy families in a timely manner, and relief workers were soon overwhelmed by the extensive demand. *Id.* at 57.

266. *Id.* at 57 (discussing the problems churches faced in giving aid to undocumented citizens). While the churches did not seek to verify the needs of the people seeking assistance, they often worked in conjunction with formal assistance providers that did require such verification, especially when funders demanded accountability. *Id.* As a result, "churches themselves then became embroiled in controversies over verification requirements, and this to some extent eroded their trust with the community." *Id.*

received, to the extent that it was shut down by a federal judge.[267] The workplace raid is also ineffective policy to enforce immigration laws because the tactics used by ICE are threatening to families, communities, the economy, employees and employers.

The problem is not that the laws on the books need to be enforced, the problem is that the laws on the books are bad laws. It is not realistic to target and remove all undocumented labor from the United States workforce. The only result will be a dangerous labor shortage for employers dependent on the services of an available and willing labor pool.

The laws are unreasonable to employers and employees and the practices by ICE officers at workplace raids are draconian. The standards allowed for investigations and interrogations were mainly developed surrounding the initial employer sanction laws passed by Congress in 1986 and have been practically abandoned as methods to enforce illegal immigration in subsequent years.[268] The reason for this is simple: businesses need inexpensive laborers and this need continues to outweigh government interests in enforcing immigration laws.[269]

The answer to illegal immigration is equally as simple, although politically difficult: legalize the necessary undocumented workforce by creating an actual guest-worker plan with a path to citizenship. As yet Congress has utterly failed to produce meaningful immigration reform designed to meet the labor demands and security interest of the United States. Workplace raids have increased so drastically because up until recently, they rarely occurred at all. The reason for this is because raids are bad for business, bad for workers, bad for families, bad for the economy, and bad

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267. *See* Order Granting Motion for Preliminary Injunction—Am. Fed'n of Labor v. Chertoff (N.D. Cal. Oct. 7, 2007) (No. C 07-04472 CRB), *available at* http://www.nilc.org/immsemplymnt/SSA_Related_Info/no-match_PI_order_2007-10-10.pdf (issuing an injunction to prevent the implementation of the no-match rule).

268. Tim Wu, *American Lawbreaking: Illegal Immigration,* SLATE, Oct. 18, 2007, http://www.slate.com/id/2175730/entry/2175742/ ("In 2004, the number of fines issued against domestic employers for employing illegal immigrants was a grand total of three.").

> If we thought illegal immigration was *really* a bad thing—if, say, the problem were the unlawful arrival not of workers, but of disease-bearing chickens—the government might rapidly deploy the most effective form of enforcement, with the support of all parts of society. But instead the nation tolerates illegal immigration to create a de facto guest-worker program. Immigration is what economists call "trade in services," and effective enforcement would make most services more expensive, just as blockading China would make many goods more expensive. It can be tough on low-wage workers, but the United States is richer overall because we get cheaper labor, while Mexicans and other workers are richer for selling it . . . . Immigration policy is perhaps the strongest example of the ways in which tolerated lawbreaking is used to make the legal system closer to what lies in the economic interests of the nation but cannot be achieved by rational politics. *Id.*

269. *Id.* (discussing the economic reasons illegal immigration is tolerated).

for communities. Raids stopped being relevant for a reason, and instead of going back and trying them again, Congress should swiftly move forward to develop a solution. The best way to solve United States immigration problems is not to get rid of this labor force, it is to legalize this labor force.

A. *Addressing the Current Undocumented Population and Planning for the Future*

The primary concern of Congress should be to legalize the undocumented population currently present in the United States. This can be accomplished through an application process that includes presence requirements, criminal background checks, and a fee large enough to pay for the administration of the new procedure.

Second, Congress should deal with the ongoing problem of the flow of undocumented people by instituting a fair and expansive plan for documenting temporary or migrant workers. This should include protections for both United States workers and immigrant workers. There should be realistic quotas on the availability of these visas based on United States employment statistics from the Bureau of Labor Statistics that adequately reflect the supply and demand of jobs in the United States. On one hand, this will guarantee that current authorized workers are not in competition with unauthorized workers. On the other, it will ensure that workers would not be directly dependent on one single employer for their immigration status. Basing the number of available visas on employment statistics versus specific available jobs is beneficial in protecting vulnerable workers because they will not be dependent on one employer for their legal status. If they lost their job, they would still be allowed to stay to find other work.

Both the plans to document people already present in the United States, and to provide a legal path to work in the United States, should include provisions that allow people to work towards permanent legal status and ultimately, citizenship. People who invest in this country by working, paying taxes, and raising families, deserve a chance to become full members of this nation.

B. *Security*

Documenting the current undocumented labor force serves two important security functions. First, a proper solution would document the vast majority of undocumented persons. This means that valuable ICE resources can be directed at seeking out and solving real threats to American security: undocumented individuals who enter and reside in the country with the intent to harm the United States and its citizens. Second, by documenting the undocumented, Congress will significantly com-

bat the increasing problem of identity theft and document fraud. Congress will significantly reduce and potentially eliminate instances of people who are merely using false information as a vehicle to employment, and will therefore free up law enforcement to seek out those who steal identities for financial gain, or for other serious crimes.

C. *Notice of Immigrants Rights*

When undocumented citizens are arrested and detained, their civil rights should be protected. It is alarming that immigrants are coerced into signing away their rights without notice of their right to legal counsel. Immigrants should be informed that although they will have to pay, they are entitled to speak to an attorney before making any admissions or decisions. Many immigrants have been in the country for a long time and a waiver of removal might be available to them. They should have the right to determine the best course of action for themselves and their families with adequate legal counsel if they so choose. Deportation should not be fast-tracked merely for the convenience of law enforcement. This could be solved by providing a written notice on any form that could result in deportation and requiring a written statement by the arrestee in his own language confirming understanding.

V. Conclusion

Attempting to enforce immigration laws through workplace raids and Social Security no-match letters is an unworkable model. It is flawed policy because it is both contrary to United States economic interests and because it is an unrealistic goal to deport all twelve million undocumented people currently in the United States. If the government continues to rely on these methods, we will continue to have serious problems for enforcing immigration laws. Instead, Congress should focus on legalizing a necessary workforce and lessening the burden on employers to enforce the laws.